82-1621

No....., Misc.

IN THE

Supreme Court of the United States

October Term, 1982

KIMERLI JAYNE PRING,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD., A NEW YORK CORPORATION, AND PHILIP CIOFFARI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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QUESTIONS PRESENTED

1. Is fiction a complete defense to a libel action under the First Amendment to the United States Constitution?
2. Does the insertion of an obviously fictional segment into a writing immunize the article as a whole from libel, even though the article contains numerous defamatory and false statements of fact?
3. Is fiction a complete defense to an action for false-light invasion of privacy?
4. Does the insertion of an obviously fictional segment into a writing immunize the article as a whole from a false-light claim, even though the article contains outrageous and ridiculing false statements of fact?

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Petitioner Kimerli Jayne Pring respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 5, 1982. The decision of the Court of Appeals is unprecedented. It decrees fiction to be a new defense to libel and false-light invasion of privacy under the First Amendment, and, further, holds that the addition of an obviously fictional portion to a larger writing serves to immunize the article as a whole.

OPINION BELOW

The opinion of the United State Court of Appeals for the Tenth Circuit is not yet reported; it appears in the Appendix hereto at page A-1.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 5, 1982. The judgment reflected the decision of a sharply-divided panel of three Circuit Court judges. A timely petition for rehearing *en banc* was denied on January 12, 1983 (A-13) with four of the nine Circuit Court judges voting for rehearing. This petition for writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are the First Amendment[1] and Fourteenth Amendment[2] to the United States Constitution.

STATEMENT OF THE CASE

This case is a tort action brought by a young Wyoming woman, Miss Wyoming, against the author (Philip Cioffari) and the publisher/editor (Penthouse International, Ltd.) of a Penthouse magazine article entitled, "Miss Wyoming Saves the World...But She Blew the Contest With Her Talent". Her suit was filed in the United States District Court for the District of Wyoming on November 15, 1979. Jurisdiction was secured on the basis of diversity of citizenship. 28 U.S.C. §1332 The complaint presented

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[1]Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[2]Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

claims for libel, false-light invasion of privacy, and outrage.

United States District Judge Clarence A. Brimmer presided over a jury trial lasting two weeks at the conclusion of which the jury returned its verdict against the defendants on all issues and on all claims for relief in the amount of $1,510,000 for compensatory damages, and $25,025,000 for punitive damages. The jury rendered a special verdict which specifically found that: 1) both defendants were guilty of negligence, recklessness, and outrage; 2) the article was reasonably understood to be about Kim Pring and to convey statements of fact about her; 3) their actions had defamed Miss Pring with actual malice; and 4) Miss Pring was a private, not a public, figure.[3]

Following an extensive review of the record by Judge Brimmer, the defendants' motion for new trial was denied, and a remittitur was ordered, reducing the award of punitive damages against Penthouse to $12,500,000. The trial judge specifically found that the remaining verdict was fair, just, and appropriate.

On appeal by the defendants to the Court of Appeals for the Tenth Circuit, the judgment was reversed solely on the basis that a portion of the article was fiction or fantasy, and, therefore, the article as a whole could not be libelous. The Penthouse story recounted the alleged sexual adventures of Miss Wyoming at the Miss America Beauty Pageant, including the charge that she publicly performed fellatio on her coach. The obvious fantasy or fictional element of this article was its additional description that the fellatio of which Miss Pring was accused caused men to levitate. Finding that levitation cannot occur from fellatio, two

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[3]The trial Court also determined that Miss Pring was a private, not a public, figure. Judge Brimmer made that ruling prior to trial, although he allowed the jury to consider the issue, too. Then, after the jury concluded that she was a private figure, Judge Brimmer again considered the issue when he overruled the defendants' motion for new trial. Having the benefit of his entire involvement with the case, and all of the evidence that had been presented, he reaffirmed his earlier ruling that Miss Pring was a private person.

members of the three judge panel ruled that the balance of the libelous article was not actionable, and thereby dismissed Miss Pring's suit in total. In so doing, the Court immunized a host of other libelous attacks in the article, not the least of which were the purported statements of fact that Miss Wyoming performed fellatio on her boyfriend in Wyoming and her coach at the Miss America Beauty Pageant. The opinion of the Court of Appeals for the Tenth Circuit found that responsibility for the irresponsible and reckless statement of fact—fellatio—could be avoided by the gratuitous addition of the fiction—levitation. Thereby, the opinion issues a license to publishers to defame any identifiable living person by falsely relating commission of any act of sexual deviation as long as that libel is then followed with some fanciful element. Simply stated, a little fiction immunizes a lot of libel.

The author of this article was Philip Cioffari, a teacher who supplemented his income by writing for publications such as Penthouse, Hustler, Chic, and Gallery. His stories were sexually explicit "formula pieces" which covered such subjects as the performance of cunnilingus with a statue of the Virgin Mary, voyeurism, sex with young girls, fellatio, and a variety of other subjects which were welcomed by the publishers. Penthouse had previously published Cioffari's "Guarding the Body of the King", a thinly-disguised short story based around the life and death of Elvis Presley. Having published that story, Penthouse announced to its readers that this "story is one in the forthcoming collection by Cioffari in which all of the stories spring from actual events in contemporary America life". (Emphasis added)

Following this announcement, Penthouse published Cioffari's article entitled, "Miss Wyoming Saves the World...But She Blew the Contest With Her Talent". It described a shallow, simple-minded Wyoming girl devoted mostly to the act of fellatio. She was a baton twirler with a beautiful body who had been a half-time performer at football games at Laramie, Wyoming. As she

was getting ready to perform at the Miss America Pageant. Miss Wyoming remembered how she discovered this "great talent" of hers—the ability to give such a "blow-job" that the recipient was actually levitated. The article, then, recounts this first experience when she performed fellatio on her boyfriend, and, she discovered, he rose from the ground:

> She drew his flesh into her, not with her mouth alone but with her entire body, the deepest, most remote parts of her uniting in common effort, calling to him, worshipping side by side with her lips and tongue and the warm tube of her throat, all of her, body and soul, crying in harmony for nourishment. Beyond the borders of his hips, her glazed eyes scaled the Tetons, pleading with the snow-tipped summit of the highest peak, for she knew not what—strength, endurance, love?—that she might lift his soul (and her own) from despair. He began to pour into her, and she thought she could feel his soul rising within him, his fountain rising at the same time so that she had to strain up on her knees to keep it in place.

But at the Miss America Pageant she performed "her talent" on her baton instead:

> While her right hand held the baton up to her mouth, her left stroked outward along the polished chrome in the direction of the judges. She had abandoned all semblance of a marching step. Instead her body swayed in a kind of interpretive dance, her shoulders rolling forward and back, her hips swiveling with slow determination as she continued the stroking motion.

Her coach chided her saying, "It looked like you were giving the damn thing a blow job". Then Miss Wyoming "in sudden inspiration" decides to display her "<u>real</u> talent" to the whole world, before a TV audience of 60 million Americans. With cameras rolling she unzips the fly of her drunken coach and commences to fellate him:

> "Shhh!" She knelt down and unzipped his fly. She wanted

> to show them that her talent was nothing to be feared, not dangerous, but beautiful and necessary.
>
> "Trust me", she whispered, * * * * and she slipped him into her mouth just as Emory Dukes announced the fourth runner-up.

And then she admits she would use this talent in the services of her country, to save the world, by giving "blow-jobs" to the enemies of the nation.

> Why do you want to be Miss America?
>
> Because I want to help the people of the world; I want to be the special ambassador of love and peace.
>
> Would you blow the entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?
>
> I would, I would. And in her mind she saw rising above the towering Tetons, like movie credits the words MISS WYOMING SAVES THE WORLD!

In a final comment, author Cioffari and Penthouse tell the readers what the real Miss America Pageant is about:

> Emory Dukes launched into "There She Goes" as Miss Alaska, flowers in hand, innocent smile flashed to the world, started down the runway. But the television cameras did not follow her. They remained stationary, trained down the alley where they had a head-on view of Miss Wyoming. Dreaming not of USO shows and appearances at 4H clubs but of what a Miss America should be, she knelt in service to her country with her eyes raised to Corky, his head and arms flung back in unimaginable delight, having just passed the three inch mark and still ascending.

Penthouse defended this obviously defamatory article on the basis that it was fiction and, thus, it could not have defamed Kim Pring, Miss Wyoming for 1978. The article was not announced or presented as fiction, however. Penthouse had declared to all of its readers that Cioffari's articles would "spring from actual events in contemporary American Life" (Emphasis added); the

cover of the magazine for that issue drew special attention to the article by referring to "Miss Wyoming's Unique Talent", failing to mention that it was fictitious and choosing, instead, to draw readers to an article concerning Miss Wyoming; the index did not list the article as fiction, calling it humor instead, although numerous past issues of Penthouse had characterized articles as "fiction"; the article itself was displayed without any reference as to whether it was or was not fiction.

When Kim Pring was selected as Miss Wyoming for 1978, it was a culminating achievement in her life. Born with a club foot, she had overcome the obstacles of that disability: after numerous surgeries it was apparent that she would not engage in dancing or other activities to develop grace and confidence; she found, however, that baton twirling was perfect for her. She was a hard and determined worker, practicing four and five hours a day for many years. Coaches encouraged her. She entered competitions and began winning. She was a high school majorette, and was for four years a majorette at the University of Wyoming in Laramie. Her perseverance was rewarded: in 1978 she achieved her young life's goal by becoming the Women's Grand National Baton Twirling Champion and was selected to represent Wyoming at the Miss America Beauty Pageant, not because of extraordinary beauty, which she did not possess, but because of her determination to excel despite her handicap.

Presenting her special talent at the Miss America Pageant was a great joy to this young woman. She performed in Atlantic City before large crowds of people—including Mr. Cioffari, the author—and became the crowd pleaser, winning honors in the talent portion of the Pageant.

She continued her reign as Miss Wyoming until July of 1979, when at about the same time the August, 1979, issue of Penthouse came to the newsstands advertising "Miss Wyoming's Unique Talent" on its cover, and inside the magazine in less than 3500 words, all that she had struggled, fought and worked for all her

life was destroyed. She had been tragically transformed before an entire nation, and before the citizens of her own state whom she had proudly represented, from the Women's Grand National Baton Twirling Champion into the world's best "blow-job" artist. She became "that Penthouse girl". "Hey, Penthouse", the men would holler across the room, and laugh. Strangers would come up and say, "Are you really as good as they say?", and proposition her. She would walk out of her house on a winter morning and find written in the snow across the back of her Volkswagen, "Give me head".

Mr. Guccione, owner and publisher of Penthouse, testified that he found the article amusing, and that it made him feel good; Cioffari, the author, said it was all coincidental. But the jury found otherwise. Rather than finding the article humorous and coincidental, the jury determined: 1) Penthouse's and Cioffari's conduct was outrageous; 2) the article was published with actual malice; and 3) a reasonable person reading the article would understand that Kim Pring was the subject of the article.

The similarities between the woman named in the article—Charlene--and Kim Pring were too substantial for the jury to believe Mr. Cioffari's and Mr. Guccione's claims of "coincidence":

- Both were described as Miss Wyoming. Throughout the article, the woman is almost exclusively referred to as "Miss Wyoming", rather than by any other name.
- Both were raised in Wyoming.
- Both were baton twirlers in the talent portion of the Pageant. Cioffari claimed he did not know that Kim Pring—the Miss Wyoming at the very pageant that he attended—was a baton twirler. She was, however, the only baton twirler in the 1978 Pageant, and the only baton twirling Miss Wyoming in the Pageant's history.
- The Pageant program distributed on the night Cioffari attended featured Kim Pring as Miss Wyoming in her baton twirling outfit.

— The Atlantic City newspapers carried a prominent news article about her entitled, "Wooing the Crowd With Her Magic Baton Routine is Kim Pring". The article contained a picture of her performing a twirling act, and described her balancing "a spinning baton on her back, neck, shoulders and even in her mouth".

— Penthouse described Miss Wyoming as a half-time performer at football games in Laramie, Wyoming. Kim Pring was a half-time performer at football games in Laramie for years.

— Penthouse's Miss Wyoming was accompanied to the Pageant by an ailing aunt; Kim Pring was accompanied by an elderly friend in a wheelchair.

— The manuscript described her as being blonde and blue-eyed, as is Kim Pring.

— Cioffari clothed Miss Wyoming in a blue chiffon evening dress. Kim Pring wore a blue chiffon evening dress on the evening Cioffari says he attended the Pageant.

— Both Penthouse's Miss Wyoming and the Miss Wyoming had an older male coach.

— Penthouse's Miss Wyoming warmed up for her routine in a baby blue warm-up suit, as did Miss Pring.

— Neither the Penthouse Miss Wyoming nor Kim Pring were among the final ten contestants.

— Perhaps the most telling "coincidence" is the hub of the article itself—the suggested symbolism of the baton and her mouth. In the eyes of the actual crowd at Atlantic City, Kim's dexterity with the baton was highlighted in a very difficult, but non-sexual, "mouth-roll". This feat was described in the newspaper article mentioned earlier. To Cioffari, the very essence of his character's performance was her taking the baton into her mouth, and stroking it, as if she were "giving the damn thing a blow-

job". The drawing created by Penthouse to illustrate the article depicts Miss Wyoming with a baton to her mouth in a sexually explicit manner.

The experience for Miss Pring was devastating. Her psychiatrist likened it to countless "emotional rapes" whereby the victim has forcibly wrenched from her the pride of her most personal, private life and the integrity of a reputation that she had earned with dedication and discipline for years. Having the article appear in the context of the Penthouse issue with leering photographs of lesbian lovers and nude women with their legs spread wide, and having been held up to the nation as the incomparable "blow-job" artist, Miss Pring retreated and withdrew from others.

The experience for Penthouse was amusing—and profitable. The magazine was purchased by approximately 5 million people for a cover price of $2.50 per copy, and it was estimated that it was read by as many as 25 million people. With 5 million purchases at $2.50 per copy, Penthouse would have realized $12,500,000 for this issue alone, not even including the advertising revenues by Penthouse at the rate of $35,000 per page.

The jury considered the evidence, and ruled against the defendants. In rendering its verdict, the jury completed a special verdict form wherein they specifically found as follows:

— That the article was of and concerning Kim Pring.

— That Kim Pring was a private person and not a public figure.

— That a reasonable person reading the article would understand that Kim Pring was the person referred to therein.

— That the article was false and defamatory and that it placed her in a false-light before the public.

— That the defendants acted negligently, outrageously, and with actual malice.

— That the article would be understood by a reasonable person to convey statements of fact about Kim Pring.

The Tenth Circuit Court of Appeals reversed the trial court's judgment with directions to set aside the jury's verdict and to dismiss the action. The two members comprising the panel's majority held that the "charged portions of the story described something physically impossible in an impossible setting...It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible...The descriptions were 'no more than rhetorical hyperbole.' Here, they were obviously a complete fantasy." (A-8)

The opinion is accurate in finding that fellatio will not cause one to levitate. However, the gratuitous addition of levitation cannot serve to excuse or immunize the charged conduct that gives rise to the levitation; i.e., the fellatio itself. The article is replete with defamatory statements that are in no way impossible, fictional, or products of sheer fantasy. Miss Wyoming is accused of performing fellatio with her boyfriend in Wyoming, with performing public fellatio on her coach at the Pageant, with fantasizing about having oral sex with the Soviet Central Committee, and with being the type of person who would disgrace her state and her family by engaging in public sexual adventures. She is charged in the introductory picture to the article with allowing her breast to be exposed while performing with her baton in her mouth, with having fights with her coach, with sitting and drinking in bars and lounges at the Pageant in violation of the Pageant rules. She is charged with fondling the baton in her mouth in a sexually explicit way, with swearing at and tripping another contestant, and with having sexual relations with a drunken coach. She is charged with shoving her breasts into the spotlight at the Pageant as she highsteps onto center stage, with flashing her thighs while the judges watch, with moving in front of the judges so they would have a full view of her "bust", her "delicious thighs", and all her "raw flesh". All of these possible and non-fantasy charges, however, were shielded from redress by the Tenth Circuit's opin-

ion, because Penthouse had added one fictional statement within this defamatory litany.

REASON FOR GRANTING THE WRIT

The decision below conflicts with the Court's holding in Letter Carriers v. Austin, 418 U.S. 264 (1974) by transforming the "false representation of fact" test into a shield that immunizes fiction from a libel action as well as from an action based on false-light invasion of privacy. In so doing, fiction has become a new defense to libel and false-light privacy invasions, even if the fictional aspect comprises but a part of the whole article.

The court below based its reasoning on an interpretation of two decisions of this Court, but in so doing, it misinterpreted the holdings in those cases and extended them into an extreme, unanticipated, and dangerous realm, thereby creating a totally new defense to libel and false-light privacy invasions. This ruling places individuals at the mercy of any publisher who chooses the simple expedient of embellishing the vilest defamations and privacy invasions with a mere touch of obvious fiction or fantasy.

The majority opinion (A-1) concentrates its discussion on two cases decided by this Court: Greenbelt Coop. Pub. Assn. v. Bresler, 398 U.S. 6 (1970) and Letter Carriers v. Austin, 418 U.S. 264 (1974). Greenbelt concerned the newspaper coverage of a city council meeting at which some citizens characterized the negotiating position of an applicant for a zoning variance as "blackmail". The discussion was accurately reported in the local newspaper, and the applicant for the variance (Bresler) sued. This Court held that the coverage of the heated public debate was accurate, that the word blackmail in the context of that case was no more than

"rhetorical hyperbole" and a "vigorous epithet", and that the news report was protected by the First Amendment. (Id. at 13-14) Fantasy or fiction was not the issue.

Letter Carriers involved a union newspaper that singled out certain individuals to be named in its "List of Scabs". The list of accompanied by a description of the term "scab" as recounted by Jack London. This Court held that the publication was protected by the First Amendment because it did not contain a false statement of fact. "Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true." (Id. at 283) The majority in Letter Carriers acknowledged that discussion in a labor dispute could be actionable if "used in such a way as to convey false representation of fact". (Id. at 286)

Three Justices expressed their concern for the breadth of the majority opinion in Letter Carriers. Mr. Justice Powell authored a dissent which was joined by Chief Justice Burger and Mr. Justice Rehnquist. The dissenting opinion expressed concern that the majority opinion "appears to allow both unions and employers to defame individual workers with little or no risk of being held accountable for doing so..." (Id. at 291)

The Court of Appeals for the Tenth Circuit has dramatically epitomized these concerns by transforming the rule of Letter Carriers into a weapon that permits publishers of "girlie magazines" or anyone else to defame private individuals with impunity. The two panel members who comprised the majority below discussed Greenbelt and Letter Carriers, and then held that the test was "whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated". (A-6) Finding that levitation by oral sex was impossible, they dismissed the action in total:

> It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged

> were impossible. The setting was impossible...The descriptions were "no more than rhetorical hyperbole" [referring to Greenbelt]. Here, they were obviously a complete fantasy.
>
> — A-8

The majority opinion in the Court below wrenches the holdings of Greenbelt and Letter Carriers out of their proper context, and then applies the holdings in such a manner as to grant immunity to a publication if even a part of the publication cannot be deemed a "false representation of fact". Both Greenbelt and Letter Carriers involved events that this Court considered to be of particular public significance: free and accurate coverage of public debate at a city council meeting, and free and open discussion during labor negotiations. There is no similar public interest in publishing a false and defamatory article about a private person in a "girlie magazine".

Both Greenbelt and Letter Carriers were decided upon the basis that the printed statements were true: the word "blackmail" had been used during the heated public discussion, and the anti-union employees were scabs. Kim Pring, on the other hand, did not perform fellatio on her coach, did not parade in front of the judges at Atlantic City like some brazen whore, did not swear at and trip fellow contestants, and did not use her talent as a baton twirler to lure people into disgracing sexual episodes. She was, instead, a young Wyoming woman who had sought to overcome her childhood handicap by developing skill as a baton twirler; struggling for many years and having the determination to forego childhood games and play in favor of long hours of practice, she finally achieved a measure of success that was extraordinary. The girl from Wyoming transformed herself into a champion baton twirler, and was selected to represent her state at the Miss America Pageant. It was Penthouse, then, that transformed the young woman into the nation's premier "blow-job" artist. Greenbelt and Letter Carriers are used by the Tenth Circuit to approve and sanction the Penthouse transformation: the majority found it was "no more than rhetorical hyperbole" and "obviously a com-

plete fantasy" in spite of the jury's determination that the article contained defamatory, false statements of fact.

Circuit Judge Breitenstein dissented from the majority opinion below (A-9), and four of the nine members of the Court of Appeals for the Tenth Circuit voted to rehear the case (A-13). Judge Breitenstein strongly criticized the majority opinion because it misconstrued Greenbelt and Letter Carriers (A-11-12), and because the majority permitted the reference to levitation to shield the balance of the defamatory article. He correctly emphasized that while levitation is not possible, and is fictitious, fellatio is a fact. Even though this Court declared "false representations of fact" to be actionable in Letter Carriers, the Tenth Circuit has attempted to nullify that ruling in declaring that the existence of a fictional representation within an article will immunize all of the myriad false representations of fact contained in the same article. In so doing, the Tenth Circuit holds false representations of fact—which are held to be actionable by this Court—to be protected in direct contravention of this Court's declaration in Letter Carriers.

Judge Breitenstein expressed his strong disagreement with the majority decision:

> I consider levitation, dreams, and public performance as fiction. Fellatio is not. It is a physical act, a fact, not a mental idea. Fellatio has long been recognized as an act of sexual deviation or perversion. Numerous decisions place fellatio within the crime of sodomy, which civilized people throughout the world have long condemned. In Hunt v. State of Oklahoma, 10 Cir., 683 F.2d 1305, a conviction for sale of a movie "graphically depicting a woman performing fellatio" Id. at 1307, was affirmed. The statements in the Penthouse article that Miss Wyoming, identified by a jury as plaintiff Pring, engaged in acts of sexual deviation and perversion, is a defamation of character which no decision of which I am aware has placed within First Amendment protection.

> Penthouse cannot escape liability by relying on the fantasy used to embellish the fact. Penthouse did not present the article as fiction. It did not make the usual disclaimer of reference to no person living or dead. In the table of contents, the article is characterized as "Humor". Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy.
>
> — A-10

The actions of Penthouse and Cioffari in this case were condemned by the jury. In doing so, the jury made certain determinations that deserve emphasis:

1. The jury found that Kim Pring was a private person, not a public figure. The trial court made the same finding, and it is a finding with which the Tenth Circuit Court of Appeals did not disagree.

2. The jury found that the article was about Kim Pring. In the special verdict form they affirmatively held that a reasonable person reading the article "would understand that the plaintiff...was the person referred to therein".

3. The jury found that the article contained false statements of fact concerning Kim Pring. In its opinion the majority below was completely in error when it stated that the "trial court submitted to the jury only the question of identity. It refused to submit the 'reasonably understood' issue, although instructions were tendered". (A-7) To the contrary, the jury was exhaustively instructed concerning false statements of fact about Kim Pring. Examples of these instructions, as well as the specific findings on the verdict form, are as follows:

- In defining the elements of libel, the trial court instructed the jury that it had to find that the article "contained false statements of fact about the plaintiff".
- In defining reckless disregard (which the jury found by clear and convincing evidence) the trial court instructed the jury that they would have to find that "the defendants

in fact entertained serious doubts as to whether the statements would be understood by a reasonable person as conveying statements of fact about the plaintiff". (Emphasis added)

— The special verdict form reveals that the jury specifically found that the defendants "made or published a false and defamatory statement concerning the plaintiff". (Emphasis added)

— The jury specifically found by clear and convincing evidence that the defendants "had knowledge of or acted in reckless disregard of whether the published matter would be understood by a reasonable person to convey statements of fact about the plaintiff". (Emphasis added)

— The trial court's Instructions 16,[4] 17, [5] 18, [6] and 19[7] instructed the jury on these issues repeatedly, forcibly, and properly.

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[4]Instruction 16 provided as follows: "The magazine piece in issue does not name the plaintiff. In order to recover, therefore, the plaintiff must show by a preponderance of the evidence that the writing was published of and concerning her. In order to so find, you must determine that the article was intended to refer to the plaintiff and that it is reasonably probable that members of the public who read the article would understand it as referring to her. A libel may be published of an actual person by a story that is intended to deal with fictitious characters if the characters or plot bear such resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. It is not enough that the readers of a story recognize one of the characters as resembling an actual person unless they reasonably believe that the character is intended to portray that person.

[5]Instruction 17 emphasized the statement of fact language from Gertz v. Welch, 418 U.S. 323 (1974): "In determining whether the passages complained of were reasonably understood as statements of fact about the Plaintiff, Kimerli Jayne Pring, you must consider the story as a whole..." [Emphasis added]

[6]Instruction 18 emphasized the statement of fact language as follows: "In determining whether the passages complained of were reasonably understood as statements of fact about the plaintiff, Kimerli Jayne Pring, you are to con-

The Tenth Circuit opinion ignores these specific jury findings, and substitutes its own judgment as to the effect of the article. It becomes mere "rhetorical hyperbole" and "complete fantasy". However, the fictional nature of levitation cannot be used to shield the abundant defamations contained in this article. It is well established that one can be defamed in the guise of fiction. Bindrim v. Mitchell, 92 Cal. App. 3d. 61, 155 Cal. Rptr. 29 (1978), cert. denied 444 U.S. 984, reh den 444 U.S. 1040 concerned the publication of a novel entitled Touching which described nude encounter sessions with a psychiatrist named Dr. Simon Hereford. A real life psychologist named Paul Bindrim brought suit, claiming that the article was depicting him in a fictional guise. The Court in Bindrim sustained the verdict against the author because people could reasonably identify the plaintiff with the fictional character.

The laws of defamation that apply to a newspaper reporter apply to the fiction writer as well. Whether one is falsely called a public fellator in the New York Times or in a writing labeled humor in Penthouse makes no difference; they both hurt just as badly. Thus, Professor Eldredge has stated in his treatise as follows:

> However, the fact that the words the plaintiff complains of appear in a story, novel, essay, play or other dramatic presentation which is intended to deal with fictitious characters does not preclude a reasonable belief by readers or audience that the plaintiff is being portrayed. [Emphasis added]
>
> — Eldredge, The Law of Defamation §10 at 53 (1978)

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sider what the statment in its plain and natural meaning and construed in its usual sense meant to the person or persons who read it..." [Emphasis added]

'Instruction 19 instructed the jury that before imposing liability, the jury had to determine that the defendants: "had knowledge of or acted in reckless disregard of whether a reasonable person reading the publicized matter would understand that the character therein portrayed was the plaintiff and the false-light in which the plaintiff would thereby be placed." [Emphasis added]

Fiction, then, presents no exception to the general law of libel. The proof is no different than that required in all cases of libel, namely that a plaintiff prove that reasonable readers would believe that the plaintiff was being portrayed. It is an issue of identification.

Defamation occurs, therefore, when an identifiable human being is held up to ridicule and scorn by a published writing. The Supreme Court in Gertz v. Welch, 418 U.S. 323 (1974) has stated that the defamation must be communicated through a statement of fact. While Gertz held that ideas are constitutionally protected, the opinion emphasized that false statements of fact are not Constitutionally protected:

> But there is no Constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues [citing case]. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality [citing case]".
>
> — Id. at 340

In discussing the libel claim in this case, the Tenth Circuit Court of Appeals acted in direct conflict with the rulings of this Court. Gertz, Letter Carriers, and other decisions of the United States Supreme Court have held that "false statements of fact" are actionable in a libel case. The Tenth Circuit, however, has turned this test against itself. As mentioned above, the jury was specifically instructed on this test, and after deliberation determined specifically in its special verdict that the article contained defamatory and false statements of fact. Thus, the article was libelous pursuant to the standards of Gertz and Letter Carriers.

But, the majority opinion below singles out the one assertion that is fanciful (i.e., the levitation) and states that levitation cannot be a fact, and then reasons that the entire libel claim should

be dismissed even though the article was found by the jury to be replete with false statements of fact—false statements of fact that Gertz and Letter Carriers have declared to be actionable. Through this reasoning, citizens are left unprotected against the most damning defamations as long as the publisher simply adds a fictional interlude within the article.

The dangers of the majority opinion below are not limited to the libel claim, however. The Tenth Circuit also dismissed the claim for false-light invasion of privacy with the following terse statement:

> It would serve no useful purpose to treat separately the 'false-light' cause of action...sought to be injected into the trial, as the same First Amendment considerations must be applied.
>
> — A-6

Having dismissed the libel claim in contravention of Gertz and Letter Carriers, the majority further exposes citizens to attacks from publishers by stripping away their right to be free from false-light invasions of privacy.

This Court has recognized false-light invasion of privacy as constituting a separate cause of action from libel. Time, Inc. v. Hill, 385 U.S. 374 (1967); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). It has been defined by the Restatement (Second) of Torts §652 E as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false-light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false-light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false-light in which the other would be placed.

This case exemplifies the importance of this separate remedy. Miss Pring was a private person living in Wyoming when Penthouse published an outrageously offensive article about her. The privacy invasion was in no degree lessened by the inclusion of the fanciful levitation. It merely extended the ridicule, made her look more outrageous, and brought greater attention to her humiliation. Rather than being an immunizing force, the element of levitation served to make the invasion more memorable, and the guffaws more resounding. The majority opinion below invites publishers to select private persons from our populace and to disgrace them, outrageously. Whether the substance of that invasion concerns factual or fictional assertions is not relevant to the false-light in which that private person is placed. See Time Inc. v. Hill, 385 U.S. 374, 384-387, and footnote 9 at 384 (1967); Burton v. Crowell Publishing Co., 82 F.2d 154 (2nd Cir. 1936); Eldredge, The Law of Defamation, §7 at 39-40 (1978). One's privacy is invaded by being subject to outrageous ridicule whether the ridicule involves false factual assertions or clearly demeaning fantasy because both create a false-light.

> The interest protected by this Section [§652 E] is the interest of the individual in not being made to appear before the public in an objectionable false-light or false position, or in other words, otherwise than he is.
>
> — Restatement (Second) of Torts, §652 E, Comment b.

The ruling by the Tenth Circuit nullifies the remedy of false-light invasion of privacy. Not only does that opinion fail to recognize the invading power of fiction, but it compounds that failure by holding that the existence of a fictional touch to the article will immunize the article as a whole. For Miss Pring—a private person—the false-light portrayal resulted from both the fictional assertion as well as the false factual assertion; both are invasive, both are outrageous, and both are ridiculing. While it would have been improper for the Tenth Circuit to have held that the charge of levitation was not a violation of this private person's right of

privacy, the danger of the ruling was intensified by its finding that the fictional assertion was a complete defense even in respect to the false factual defamations.

This court has repeatedly and clearly held that the law of defamation is different than as applied by the Court below. This Court has never said that false-light cases are judged by the same rules as are defamation cases, and it has never held that fictional embellishment immunizes either claim. To permit the Tenth Circuit's ruling to stand is to encourage publishers to utilize the fictional device as a shield against the vilest defamations and the most outrageous invasions of privacy.

It is time to reject the effort by Penthouse to wrap this conglomerate of indecencies in the fine, luxurious silks of the First Amendment. The dignity of that Amendment is tarnished by the argument itself. This Court has repeatedly emphasized that the protections it has given to publishers in New York Times v. Sullivan, 376 U.S. 254 (1964) and other cases do not grant to publishers a "license to destroy lives or careers". Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967). See also, Gertz v. Welch, *supra.* The opinion of the Tenth Circuit Court of Appeals grants this license to destroy the reputation of a young woman who was specifically found by judge and jury alike to be a private person by the simple expedient of embellishing the defamation and the privacy invasion with an absurdity. The Tenth Circuit's ruling directly conflicts with Letter Carriers, as well as the entire body of libel and privacy law.

Penthouse is a commercial enterprise that made huge revenues from a magazine issue. To make a portion of its money, it chose to defame and destroy a decent young woman. All of us are human beings who live and work and think with certain human attitudes. Perhaps the most important statement that can be made about this case springs from those simplest of human feelings: a simple, true, and accurate belief that "this is not right".

It was not right for Penthouse to transform Kim Pring into a hussy, to pluck her out of the Wyoming plains like some kind of

bauble they could play with in their New York corporate offices, painting her falsely with whorish and brazen colors, dangling her in front of millions of men to leer and gawk at as they flip through pages of descriptions of fellatio, intermixed with photographs of lesbian lovers who reach sexual climax with the aid of water from a garden hose. It is not right that this Court's pronouncement in Letter Carriers is turned against itself by the Tenth Circuit when it declares that a single fictional embellishment will preclude a cause of action for the myriad false representations of fact contained in the same article. It is not right that Kim Pring is used in this manner and it is not right that others in the future may be so used by Penthouse or other publications when they decide to make more money by dangling another young bauble before their readership.

It is time for common sense to prevail. If the Penthouse argument is approved and the ruling by the Tenth Circuit Court of Appeals permitted to stand, then all citizens—public figures and private, obscure people alike—will be without remedy against the vilest defamations and the most outrageous false-light invasions of privacy. Publishers will be permitted to escape liability simply by inserting an obviously fictional segment into the offensive, and otherwise actionable, article. This publishing expedient will thereby serve to immunize the article from redress, and to wrest from all citizens the rights that this Court has painstakingly decreed.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

G.L. Spence
Robert P. Schuster
SPENCE, MORIARITY & SCHUSTER
Counsel for Petitioner

APPENDIX

United States Court of Appeals, Tenth Circuit.

No. 81-1480.

Kimerli Jayne Pring, Plaintiff-Appellee, v. Penthouse International, Ltd., a New York corporation, and Philip Cioffari, Defendants-Appellants. Appeal from the United States District Court for the District of Wyoming (D.C. No. C79-351B).

Thomas B. Kelley of Cooper & Kelley, P.C., Denver, Colorado, Norman Roy Grutman of Grutman & Miller, New York, New York (Frank R. Kennedy of Cooper & Kelley, P.C., Denver, Colorado, and Carmichael, McNiff & Patton, Cheyenne, Wyoming, with them on the brief), for Defendants-Appellants.

G.L. Spence of Spence, Moriarity & Schuster, Jackson, Wyoming (Edward P. Moriarity, Robert P. Schuster, and Robert N. Williams, with him on the brief), for Plaintiff-Appellee.

R. Bruce Rich, New York, New York, filed a brief on behalf of Amicus Curiae Association of American Publishers, Inc., Lauren W. Field and Yvette Miller of Weil, Gotshal & Manges, New York, New York, of counsel.

Jack C. Landau, Sharon P. Mahoney, and Clemens P. Work, Washington, D.C., filed a brief on behalf of Amicus Curiae Reporters Committee for Freedom of the Press.

Irwin Karp, New York, New York, filed a brief on behalf of Amicus Curiae The Authors League of America, Inc.

Before SETH, Chief Judge, BREITENSTEIN and LOGAN, Circuit Judges.

SETH, Chief Judge.

This defamation case concerns an article which appeared in defendant's magazine Penthouse. It was written about a "Charlene," a Miss Wyoming at the Miss America contest and about the contest. The defendants argue that the story is a spoof of the contest, ridicule, an attempt to be humorous, "black humor," a complete fantasy which could not be taken literally.

The basic question which had to be resolved at the trial was in two parts — whether the publication was about the plaintiff, that is, whether it was of and concerning her as a matter of identity; and secondly, whether the story must reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff.

The first element, the matter of the relationship of the story to the plaintiff as a matter of identity, is well developed in the record and need not be discussed. The jury resolved the matter in Special Verdict Form #2 and its position is supported by the record. This is a matter to be determined from the story as a whole. See New York Times Co. v. Sullivan, 376 U.S. 254, and Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir.).

The second element, that the story must reasonably be understood as describing actual facts about the plaintiff or her actual conduct, obviously is quite different from the first. In some opinions it is treated as part of the "of and concerning" requirement. It is really part of the basic ingredient of any defamation action; that is, a false representation of fact. In the case before us this requirement that the story must reasonably be understood to describe actual facts about the plaintiff has become the central issue.

The Supreme Court in Letter Carriers v. Austin, 418 U.S. 264, held that a false representation of fact was required, but there "no such factual representation can reasonably be inferred." Letter Carriers, of course, had the added ingredient of a labor dispute, but this does not remove the factual statement requirement. In Letter Carriers the Court stated: "Before the test of

reckless or knowing falsity can be met, there must be a false statement of fact," citing Gertz v. Robert Welch, Inc., 418 U.S. 323. This factual statement and "reasonably understood" element is described by the Supreme Court as a constitutional requirement. It is, of course, a basic part of the First Amendment-defamation interaction.

In Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6, the Court considered a newspaper story which referred to the position the plaintiff had taken on matters before the city council as "blackmail." The stories the paper carried were full and accurate. The "blackmail" characterization was made by a speaker at the council meetings. Plaintiff had property the city wanted to buy and plaintiff had other property he wanted to have rezoned. Discussions with the city on both matters were proceeding concurrently. The trial court and the Maryland Court of Appeals viewed the use of the word as charging the crime of blackmail, and since the paper knew plaintiff had committed no such crime it would be held liable for the "knowing use of falsehood." As to this theory the Supreme Court said, "[W]e hold that the imposition of liability on such a basis was constitutionally impermissible — that as a matter of constitutional law, the word 'blackmail' in these circumstances was . . . not libel." The Court as a reason for its holding stated in substance that no one could take the word literally and that it referred to plaintiff's "bargaining position." The Court said:

> "No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who consider Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

> "To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." (Footnote omitted.)

See also Letter Carriers v. Austin, 418 U.S. 264.

In Letter Carriers, referred to briefly above, the publication included a list of names of persons who had not joined the union. It described them as "scabs" and provided a derogatory description of what a scab was, including "a traitor to his God, his country." The Court made the "statement of fact" requirement, and in substance held that the statements could not be taken literally and no factual representation was present. See also Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass.).

The article had its setting at a Miss America contest and described Charlene, a Miss Wyoming at the contest, who was a baton twirler. The article began with a description of Charlene with other contestants at a bar during the course of the contest. It quotes a conversation between Charlene and her coach, a man referred to as Corky. The story then switches to the contest as Charlene is about to perform her talent as a baton twirler. She is about to go on stage and her thoughts are described. She thinks of Wyoming and an incident there when she was with a football player from her school. It describes an act of fellatio whereby she causes him to levitate. The story returns to the Miss America stage where she goes on to perform her talent. She there performs a fellatio-like act on her baton which stops the orchestra. The act is concluded and the conversation between Charlene and her coach is described, and conversation with other contestants. She did not reach the finals but she says or thinks she has a "real talent." The third incident is then described. She is at the edge of the stage during the finals while the finalists are at center stage and the finals are under way. Charlene's thoughts are again described and these are how she would have answered the questions

put to the finalists had she been one. These thoughts were that she would "save the world" with her real talent with the "entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?" She would be the ambassador of love and peace. The article then describes an act of fellatio with her coach at the edge of the stage while the audience was applauding the new Miss America in center stage. This fellatio causes the levitation of her coach. It is described that the television cameras were not on the new Miss America but "remained" on Charlene and her coach who was then rising into the air, and the story ends.

The complaint, as amended, refers to these incidents and limits the consequences to:

> "The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest."

Plaintiff by her amendment of her complaint to avoid answering interrogatories, as mentioned above, narrowed her cause to the three incidents and limited them to the descriptions with no general implications. This had three consequences: the trial court limited defendants as to what they could question plaintiff about — no sex history; prevented plaintiff from any use of general imputations of immorality; and caused a reliance on the particular descriptions.

The author of the article was the defendant Cioffari, a PhD who was a professor of English at a university in New Jersey.

As described, Greenbelt concerned a factual newspaper account with the word "blackmail" in that context. Here, the underlying event described was the Miss America Pageant, but it was readily apparent, with the extended description of thoughts of Charlene

and other indications, that it was all fanciful and did not purport to be a factual account. In this context there are the particular three incidents which are in themselves fantasy and present levitation as the central theme and as a device to "save the world." We have impossibility and fantasy within a fanciful story. Also of significance is the fact that some of the incidents were described as being on national television and apparently before the audience at the pageant or part of the audience. This in itself would seem to provide a sufficient signal that the story could not be taken literally, and the portions charged as defamatory could not reasonably be understood as a statement of fact. Again, as the Court said in Greenbelt: "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant."

The witnesses from the community who appeared for the plaintiff all testified that the story could not possibly be about her as she would not do that. The plaintiff asserted, and the trial court concluded, that the descriptions be taken literally. The Court said in Greenbelt: "The imposition of liability on such a basis was constitutionally impermissible." The "blackmail" there and the three incidents described in the publication here concerned must be regarded in the same way. Neither is to be taken literally and neither could reasonably be considered a statement of fact.

It would serve no useful purpose to treat separately the "false-light" cause of action nor the "outrageous conduct" doctrine sought to be injected into the trial, as the same First Amendment considerations must be applied.

The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally. This is clearly the message in Greenbelt and Letter Carriers. The plaintiff urges

that this constitutional doctrine should apply only to public figures, but there is no such limitation and the disposition of the several cases considered above so demonstrates. The court in Bindrim v. Mitchell, 155 Cal. Rptr. 29, which is discussed by both parties, considers this issue also. See also Bucher v. Roberts, 595 P.2d 239 (Colo.); and Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass.).

The trial court submitted to the jury only the question of identity. It refused to submit the "reasonably understood" issue although instructions were tendered. The instruction given, No. 16, in part, states:

> "The magazine piece in issue does not name the Plaintiff. In order to recover, therefore, the Plaintiff must show by a preponderance of the evidence that the writing was published of and concerned her.
>
> "In order so to find, you must determine that the article was intended to refer to the Plaintiff and that it is reasonably probable that members of the public who read the article would understand it was referring to her. A libel may be published of an actual person by a story that is intended to deal with fictitious characters, if the characters or plot bear such resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person."

The special verdict contains the same standards. This is as close as the trial court came to instructing on the "reasonably understood" matter and it is apparent that the instruction is only a matter of identifying the plaintiff, and has no other element. The jury found that plaintiff was the person "referred to"—it was about her.

It appears that the trial court had decided the story generally was not fiction in its ruling on the pretrial motion to dismiss, and that this disposed of the matter. The trial court thus treated the whole story as a statement of fact as the trial court did in Greenbelt.

This was error. The Supreme Court in Greenbelt, under comparable circumstances, held that to give a literal meaning to the word there concerned was "constitutionally impermissible." The Court in the circumstances before it in Greenbelt thus treated the "reasonably understood" element as a question of law: "It is simply impossible to believe that a reader . . . would not have understood exactly what was meant."

The first inclination is to hold that the issue described above should have been submitted to the jury. It is apparent that an argument can be built on the word "reasonably" as a typical element for a jury, and in some circumstances it could be a jury question. Justice White in his concurrence in Greenbelt suggests that it was there a jury question. The majority, however, regarded it as a matter of law.

All the testimony from plaintiff's lay witnesses was that it could not be about the plaintiff. An "expert" witness testified that some individuals might attach a broader subliminal meaning of sexual permissiveness, but this does not represent an applicable standard and cannot be regarded as much more than a contradiction of the testimony of her witnesses.

The charged portions of the story described something physically impossible in an impossible setting. In these circumstances we must reach the same conclusion, as did the Court in Greenbelt, that it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else. It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible.

This does not leave, on the record before us, any alternative but to decide as a matter of law, as was said in Greenbelt, "even the most careless reader must have perceived that." The descriptions were "no more than rhetorical hyperbole." Here, they were obviously a complete fantasy.

The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. Although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied. The magazine itself should not have been tried for its moral standards. Again, no matter how great its divergence may seem from prevailing standards, this does not prevent the application of the First Amendment. The First Amendment standards are not adjusted to a particular type of publication or particular subject matter.

The Supreme Court considered what it described as "vulgar magazines" in Winters v. New York, 333 U.S. 507, and held that despite all the disparate views they were within the protection of the First Amendment. The gross nature of the article here concerned makes an objective analysis of the law difficult, but we do not make a moral judgment as to this magazine, or other writings of the author, nor on the article generally as plaintiff urges by her brief.

The judgment must be reversed with directions to set aside the verdict of the jury and to dismiss the action.

IT IS SO ORDERED.

BREITENSTEIN, Circuit Judge, dissenting

The majority holds that as a matter of law this defamation action

must be dismissed because the publication was pure fantasy protected by the First Amendment. I do not agree.

On overwhelming evidence the jury found that the plaintiff Pring was the "Miss Wyoming" about whom the Penthouse article was written. The majority accept that jury finding. The question is whether Penthouse can escape liability by the claim that the article was fiction and fantasy.

The article contains both fact and fiction. The article says that Miss Wyoming performed fellatio with a male companion and caused him to levitate. In her appearance at a national Miss America contest she thought that she might save the world by similar conduct with high officials. She manipulated her baton so as to simulate fellatio. She performed fellatio with her coach in view of television cameras. I consider levitation, dreams, and public performance as fiction. Fellatio is not. It is a physical act, a fact, not a mental idea. Fellatio has long been recognized as an act of sexual deviation or perversion. Numerous decisions place fellatio within the crime of sodomy, which civilized people throughout the world have long condemned. In Hunt v. State of Oklahoma, 10 Cir., 683 F.2d 1305, a conviction for sale of a movie "graphically depicting a woman performing fellatio" Id. at 1307, was affirmed. The statements in the Penthouse article that Miss Wyoming, identified by the jury as plaintiff Pring, engaged in acts of sexual deviation and perversion, is a defamation of character which no decision of which I am aware has placed within First Amendment protection.

Penthouse cannot escape liability by relying on the fantasy used to embellish the fact. Penthouse did not present the article as fiction. It did not make the usual disclaimer of reference to no person living or dead. In the table of contents, the article is characterized as "Humor." Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy. Penthouse does not claim that the fact statement was truthful. Moral standards may have changed

since the First Amendment was adopted but that change has not gone so far as to protect a publisher which defames an identifiable living person by relating commission of an act of sexual deviation and perversion.

To justify the conclusion that the First Amendment defense presents a question of law, the majority adopt the "reasonably understood" test. To support that test reference is made to Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6, and Letter Carriers Assn. v. Austin, 418 U.S. 264. Bresler involved a newspaper report of a public meeting held by a City Council. The article truthfully reported that a person present at the meeting characterized the plaintiff's negotiating position as "blackmail." In reversing a judgment for plaintiff, the Court said that the publication did not impute a crime and that even the most careless reader would perceive that the word "blackmail" was no more than a "rhetorical hyperbole, a vigorous epithet." 398 U.S. at 14.

Letter Carriers was a defamation action arising out of a labor dispute in which a union publication referred to plaintiffs as "scabs" and equated "scab" with "traitor." In reversing a judgment for plaintiffs, the Court applied law relating to labor disputes and said, 318 U.S. at 283: "Rather than being a reckless and knowing falsehood, naming the appellees as scabs was literally and factually true."

In both Greenbelt and Letter Carriers the alleged defamatory statement was true. Penthouse makes no claim that the act of fellatio by Miss Wyoming was true. The word "fellatio" was not used as a hyperbole or epithet. It was used to describe a physical act. The use of the technical Latin term rather than the vulgar vernacular does not protect Penthouse. The descriptions of the conduct of Miss Wyoming would make even the most careless reader aware of sexual deviation and perversion. The jury found that a "reasonable man" would understand that the plaintiff was the person referred to in the article, that the article was false and defamatory, and that it "unreasonably" placed the plaintiff in a

false light before the public. See Jury Verdict, R. 1500-1503.

Nothing in Greenbelt or Letter Carriers applies a "reasonably understood" test to defamation actions generally. In each of those cases the alleged defamatory statement was literally true. Here it was not.

The action of the majority in applying the "reasonably understood" test as a matter of law contravenes the Tenth Circuit decision in Lawrence v. Moss, 10 Cir., 639 F.2d 634, cert. denied 451 U.S. 1031 (1981). The Lawrence decision cites and analyzes Supreme Court cases with facts more analagous to the present case than either Greenbelt or Letter Carriers. Id. at 636-637. I stand by that analysis. Lawrence reversed a summary judgment for defendant, directed that a jury trial be held, Id. at 638-639, and said that questions of intent and malice are for the fact finder. Id. So also is the question of "reasonably understood." I recognize, as does Lawrence, that in some defamation cases brought against news media summary judgment may be proper as a screening device to prevent unnecessary harassment. Id. at 639. That principle does not apply here. The district court properly submitted the case to the jury.

The majority reject the jury verdict and order dismissal because, as a matter of law, the article is not defamatory. I disagree and, accordingly, dissent. The majority order of dismissal makes it unnecessary to consider the many other issues raised in the briefs.

NOVEMBER TERM—January 12, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges.

Kimerli Jayne Pring, Plaintiff-Appellee, v. Penthouse International, Ltd., a New York corporation, and Philip Cioffari, Defendants-Appellants, Association of American Publishers, Authors League of America; The Reporters Committee for Freedom of the Press, Amicus Curiae. No. 81-1480.

The Court, upon its own motion, in order to correct a clerical error in the order entered January 11, 1983, in the captioned cause, vacates that order and reissues it in its entirety to read as follows:

This matter comes on for consideration of appellee's Kimerli Jayne Pring, petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Circuit Judge Breitenstein voted to grant rehearing.

The clerk transmitted the suggestion for rehearing in banc to the members of the panel and to the judges of the court who are in regular active service. A vote was requested. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing in banc is denied. Circuit Judges Breitenstein, Holloway, Barrett, and Doyle voted to grant rehearing in banc.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

No. 82-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIMERLI JAYNE PRING, PETITIONER

v.

PENTHOUSE INTERNATIONAL, LTD, a New York Corporation, and PHILIP CIOFFARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a $14,000,000 judgment against a publisher and author based on the publication of a satirical work of fiction is consistent with the First Amendment, when the complaint rests solely on the claim that the satire created a false impression that the plaintiff committed certain fantastical acts, and when the satire on its face describes inherently fantastical actions by fictitious persons and there is no evidence of record that any reader believed the satire was a factual representation.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1-12) is reported at 695 F.2d 438.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1982. A petition for rehearing was denied on January 12, 1983 (Pet. App. 13). The petition for a writ of certiorari was filed on April 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Kimerli Jayne Pring filed suit against respondents in the United States District Court for the District of Wyoming, alleging libel, invasion of privacy on the basis of "false light" publicity,[1] and "outrageous conduct." All of her claims arose from a short story entitled "Miss Wyoming Saves the World — But She Blew the Contest With Her Talent." The story was written by respondent Cioffari, a free lance writer. Cioffari sold the story to respondent Penthouse International, Ltd., and it was published in the August 1979 issue of *Penthouse* magazine. For the convenience of the Court, we have reproduced the text of the story in the appendix to this brief.

Petitioner was a performer and is now a teacher of baton twirling. She has achieved national prominence and publicity in this field (R. Vol. VIII, pp. 137-163, 181, 187, 226-231, 238-251). From June 1978 until June 1979, petitioner held the title "Miss Wyoming." In September 1978, she participated in that capacity in the Miss America Pageant. In the talent segment of the pageant, she performed a baton routine which won an honorable mention (Pet. 7).

The "Miss Wyoming" story is a fantastical work of fiction. Time and place are unspecified but the setting is a satiric version of the Miss America Pageant. The central character is a young woman named "Charlene" who, as indicated by the title

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[1] The original complaint asserted all four of the recognized theories of invasion of privacy. See *Restatement (Second) of Torts* §652A-652E. At the final pre-trial conference, however, petitioner limited her invasion of privacy claim to the false light theory (R. Vol. VII, pp. 48-49), the elements of which are set forth in the *Restatement*, §652E. Although the Supreme Court of Wyoming has not recognized the tort of "false light" publicity, the trial court assumed that Wyoming would follow the *Restatement*.

of the story, participated in the pageant as "Miss Wyoming."[2] As the story begins, Charlene is about to perform a baton twirling exercise in the talent segment of the pageant. She feels insecure and begins to think about performing her "real talent." This, her thoughts reveal, is the ability to cause those upon whom she performs fellatio to "rise off the ground" and float in the air. The story, as summarized by the court of appeals, then relates the following (Pet. App. 4):

> "She thinks of Wyoming and an incident there when she was with a football player from her school. It describes an act of fellatio whereby she causes him to levitate."

The "football player" is the left end for the "Laramie Lizards," who is given the fanciful name "Monty Applewhite." There was no evidence at trial that any reader understood Monty Applewhite to be anyone but an imaginary character.

The court of appeals' description of the story continues as follows (*ibid.*):

> "The story returns to the Miss America stage where she goes on to perform her talent. She there performs a fellatio-like act on her baton which stops the orchestra."

The fellatio-like act has the same fantastic effect upon the baton (Appendix, *infra*, at 7a): "It began to rise slowly. Ignoring gravity, it lifted above the astonished faces of the judges, the audience . . ."

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[2] When the story was published, Penthouse had no notice that the story reflected upon or created a false impression of fact about any real person (see R. Vol. X, pp. 303, 313-315, 321, 399-400; R. Vol. XI, pp. 705-706, 754, 757). Its knowledge was limited to what was apparent from the face of this fantastic work — namely, that it referred to a fictitious character called "Miss Wyoming" who was capable of performing physically impossible acts. See pages 3-4, *infra*.

The court of appeals recounted the third and final incident in the story, involving Charlene's coach "Corky Corcoran," as follows (Pet. App. 4-5):

> "She is at the edge of the stage during the finals while the finalists are at center stage and the finals are under way. Charlene's thoughts are again described and these are how she would have answered the questions put to the finalists had she been one. These thoughts were that she would 'save the world' with her real talent with the 'entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?' She would be the ambassador of love and peace. The article then describes an act of fellatio with her coach at the edge of the stage while the audience was applauding the new Miss America in center stage. This fellatio causes the levitation of her coach. It is described that the television cameras were not on the new Miss America but 'remained' on Charlene and her coach who was then rising into the air, and the story ends."

2. Petitioner filed suit on November 15, 1979, approximately four months after the publication. She claimed that the story was really about her, and that it caused her hurt feelings, weight gain, and reputational damage. Petitioner's claims were based upon similarities between herself and "Charlene," the imaginary character depicted in the story. The parallels — all of which involved matters which petitioner had placed in public view as a performer — were as follows: both were baton twirlers from Wyoming who had performed at football games, and both appeared as Miss Wyoming in the Miss America Pageant. Less significantly, Charlene at one point in the story is described as wearing a "baby blue warmup suit" and at another point as wearing "baby blue chiffon;" at the pageant, petitioner wore a baby blue and white striped warmup suit and a blue chiffon gown (which she described as baby blue at trial, but which other witnesses described as aqua) (see R. Vol. XIII, pp. 168, 173, 257; R. Vol. XIV, p. 225).

The balance of the alleged parallels between petitioner and the fictional "Charlene" are argumentative at best. For example, petitioner grew up and went to high school in Cheyenne, Wyoming, not Laramie, as did the fictional Charlene. While at the University of Wyoming in Laramie, petitioner performed at half-time for the college football team, the Wyoming Cowboys, not Charlene's clearly fictional high school team, the "Laramie Lizards." At the pageant, Charlene was accompanied only by her high school coach, "Corky" Corcoran, while petitioner, then in college, attended without a coach but with a female companion (see R. Vol. XIII, pp. 151-156, 261-262).

The dissimilarities between petitioner and "Charlene" were numerous and fundamental, as would be expected in any work of fantasy. For example, the two fictional men upon whom Charlene performed fellatio had no counterparts in petitioner's life. And most significantly, as clearly understood by all witnesses who testified (see Pet. App. 6, 8), and as would be and was clearly understood by any rational person reading the story, neither petitioner nor any other human being ever acted as did the fictional character Charlene in the only portions of the story which could be deemed defamatory.

3. In her original pleadings, petitioner alleged, as the basis for all of her claims, that the "*net effect* of the [story] was to create the impression throughout the United States and Wyoming that the plaintiff was sexually promiscuous, depraved, unchaste, . . . morally lacking, and deviant" (R. Vol. I, pp. 3, 5-6).

In connection with these allegations, and the issues of truth, credibility, and mitigation of damages, respondents sought certain discovery concerning petitioner's sexual behavior. Petitioner refused to answer any such questions. In order to avoid sanctions, her attorney drastically limited the case by

amending her pleading. Specifically, the Third Amended Complaint eliminated all references to petitioner's good character and reputation, and all allegations that the story imputed the general character defects and bad habits previously alleged. Instead of her former "net effect" allegation, petitioner pleaded that the "net effect" of the story was *to literally accuse her of engaging in the three particular acts by which the fictional character "Charlene" causes levitation.* Specifically, the Third Amended Complaint (¶ 10) narrowed the claims and limited the alleged consequences of respondents' publication as follows:

> "The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest."

Although the purpose of this amendment was to avoid discovery sanctions, it was neither solicited nor required by the trial judge.[3] For the convenience of the Court, we have reprinted petitioner's Third Amended Complaint in the Appendix to this brief.

4. At trial, there was not a scintilla of evidence in support of the allegations of the Third Amended Complaint, which limited petitioner's cause of action to the claim that the article actually created the impression that petitioner had engaged in the three specified acts of immoral behavior. To the contrary, *all* of petitioner's witnesses testified that they had *no such impression.* In the words of the court of appeals, the "witnesses

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[3] The trial judge ruled, on the basis of the amendments to the pleadings, that the "plaintiff is not required to answer the questions referred to" and that:

> "Issues relating to the plaintiff's personal sex history prior to the publication that is the subject of this action are and should be irrelevant." R. Vol. IV, p. 1187.

from the community who appeared for the plaintiff *all* testified that the story could not possibly be about her * * *" (Pet. App. 6).[4]

During trial of the case, respondents tendered instructions which would have required the jury to find that the challenged portions of the story were reasonably understood as describing actual conduct and events involving petitioner. This was consistent with petitioner's pleadings. The verdict form tendered by respondents would have required a similar finding.

With respect to respondents' proposed jury instructions, however, petitioner's counsel repeatedly declared (contrary to petitioner's Third Amended Complaint and her petition in this Court): "everybody knows that it is fiction so that [would result in] a directed verdict." R. Vol. XV, pp. 312, 325-326, 335. The trial court accordingly rejected respondents' proposed instructions. It instructed only on the question whether petitioner could be identified as the person referred to in the story, and not on the question whether the challenged portions of the story could reasonably be understood as describing any actual con-

[4] There was some evidence of joking and teasing concerning the story. But this was not shown to be a result of any factual impression reasonably conveyed by the story. Still more important, there was no evidence to distinguish between teasing which resulted from the story itself and that which occurred as a result of petitioner's filing suit shortly after the story was published (through a nationally prominent lawyer) *and publicly asserting that the story was about her.* From its inception, petitioner's lawsuit was attended by extensive publicity, in which petitioner and her attorney have been conspicuously featured. For example, petitioner posed for a cover photo for a story in the *Rocky Mountain Magazine* about a "Legendary Lawyer . . . and a Wyoming Beauty Queen . . ." who "took on 'Penthouse' for $100,000,000." She also gave an interview which described in detail the *Penthouse* story and its purported reference to her (see R. Vol. III, p. 920).

duct or events. R. Vol. XVI, pp. 3-12. Based on these limited instructions, the jury returned a verdict in petitioner's favor.[5]

At the conclusion of trial, the jury awarded compensatory and punitive damages against respondents as follows:

Actual Damages	Punitive Damages
Cioffari—$10,000	Cioffari—$25,000
Penthouse—$1,500,000	Penthouse—$25,000,000

In ruling upon post-trial motions, the trial court remitted the punitive damage award against Penthouse from $25,000,000 to $12,500,000, but otherwise left the jury verdict intact.

The final judgment of $14,035,000 is, by a considerable margin, the largest judgment ever upheld by a trial court in a libel case.

5. On appeal, respondents contended that the judgment should be reversed for a number of independent reasons,[6]

[5] Contrary to petitioner's assertion (Pet. 3, 16-17), the jury never was required to find that the story was "reasonably understood . . . to convey statements of fact about her." The court of appeals expressly rejected that assertion (Pet. App. 7): "The trial court submitted to the jury only the question of identity. It refused to submit the 'reasonably understood' issue although instructions were tendered." Petitioner cites certain instructions, dealing with other issues, which contain language that, at most, suggests the need for some statement of fact concerning petitioner. However, the jury never was told that it must find that the allegedly *defamatory portions* of the story depict actual conduct, or make factual assertions, about petitioner's behavior. Moreover, as discussed on pages 6-7, *supra*, there was no evidence at trial that any reader so understood the story, much less that a "reasonable" reader would do so.

[6] For the convenience of the Court, we have lodged ten copies of respondents' brief in the court of appeals, which fully discusses the many alternative grounds for reversing the judgment of the district court. That brief is referred to hereinafter as "C.A. Br."

including the following. First, the First Amendment precludes the imposition of liability in a case such as this based on a work of satire that could not reasonably be understood as conveying factual information about petitioner (C.A. Br. 10-27). Second, there was no proof or proper finding in this case of fault and malice, as required to sustain a verdict for actual and punitive damages in a suit based on invasion of privacy and defamation (C.A. Br. 27-45). Third, the jury's verdict was the result of passion and prejudice provoked by continuous misconduct of petitioner's counsel (C.A. Br. 45-59).[7]

By a divided vote, the court of appeals reversed the judgment of the trial court with directions to dismiss the complaint. The court ruled, as a matter of law, that the three passages in the story upon which petitioner relied were not actionable as pleaded because they could not reasonably be understood as describing actual facts or events involving petitioner, or actual conduct by her. Pet. App. 2, 6, 8. In so holding, the court of appeals relied upon the decisions of this Court in *Greenbelt Cooperative Publishing Ass'n, Inc.* v.

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[7] The $14,000,000 judgment was procured through deliberate and calculated efforts on the part of petitioner's counsel to instill passion and prejudice by repeated appeals to regional bias and repeated emphasis upon inflammatory, irrelevant matters. See pages 45-57 and the Appendix to respondents' brief in the court of appeals. This occurred in violation of the trial court's instructions or in breach of well established rules of conduct which apply in all federal courts. During trial, the trial judge observed that petitioner's counsel repeatedly had tempted him to grant a mistrial. R. Vol., p. 193. Of particular concern in a First Amendment case such as this, counsel persistently focused upon *editorial materials* in various issues of respondent's magazine which were totally unrelated to the "Miss Wyoming" story. Those references were calculated to cast the publication as ideologically repugnant and threatening to the values of Wyoming jurors.

Bresler, 398 U.S. 6 (1970), and *Old Dominion Branch No. 496, National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), as well as the similar decision of the Massachusetts Supreme Judicial Court in *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980).[8]

Petitioner subsequently filed a petition for rehearing *en banc*. Five of the eight judges on regular active duty on the court voted not to rehear the case *en banc* (Pet. App. 13).

[8] As noted by the dissenting member of the panel, the opinion and judgment of the court of appeals left unresolved most of the other issues raised by respondents on appeal. Pet. App. 12.

REASONS FOR DENYING THE PETITION

1. The Miss America pageant is an annually recurring public event which commands interest and attention on a national scale. It is always one of the most extensively televised events of the year (see Appendix, *infra*, at 15a). Petitioner eagerly accepted the public attention which focused upon this event (R. Vol. XIII, pp. 247, 250-251, 272-274).

In addition to being highly visible, the pageant has provoked controversy and criticism from persons who believe that it amounts to little more than erotic puffery and trite recitations of platitudes by contestants. It has generated countless critiques and satires, some of which have been extremely caustic.[9]

The "Miss Wyoming" story is a work of fiction. It satirizes the Miss America pageant through grotesque irony. It applies a style of "black humor" also used by magazines such as "National Lampoon" and the television program "Saturday Night Live." Because of its inherent improbability — indeed, its physical impossibility — the narrative does not convey even the slightest impression of reality.

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[9] For example, ten years before the 1978 pageant, in a 1968 *Life* magazine article, correspondent Shana Alexander described the "talent" segment of the pageant — which was the focus of the crucial passages in the Miss Wyoming story — as follows:

> "Talent being rarer than beauty in 18-year old girls, the talent contest places the Smile under a ghastly strain. One girl, a trampolinist, smiled madly upside down. A ballerina smiled her way through 'The Dying Swan,' somehow suggesting death in a frozen poultry locker. A third girl's talent was to synchronize bubble gum-chewing and the Charleston.
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> . . . . . The complication of the so-called 'talent contest' obliges (the contestants) to conspire in their own humiliation. And despite all the schmaltz and the sanitizing, there clings to the proceedings a strong taint of the auction block."
> (*LIFE*, Sept. 20, 1968, p. 28).

In recognizing First Amendment protection in this context, the court of appeals has rendered a decision that is in complete harmony with past decisions of this Court and with lower courts, state and federal, which have considered the question presented. There is no authority — in federal or state court — for the proposition that a satirical work may be the basis for a multi-million dollar judgment against a publisher and author in the absence of clear evidence that the satire conveyed a false factual impression about the plaintiff. As the very cases cited by petitioner state, there can be no claim for damages unless "a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff *acting as described.*" Where, as here, "an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted * * *," a judgment for the plaintiff cannot stand. *Bindrim* v. *Mitchell,* 155 Cal. Rptr. 29, 39, 92 Cal. App.3d 61, 78 (Cal. App. 1979) (emphasis supplied). This general principle has been recognized repeatedly in decisions of this Court as well. See *National Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264, 281-287 (1974); *Greenbelt Cooperative Publishing Ass'n, Inc.* v. *Bresler,* 398 U.S. 6, 13-14 (1970); see also *Time, Inc.* v. *Hill,* 385 U.S. 374, 387-389 (1967); *Schad* v. *Borough of Mount Ephraim,* 452 U.S. 61, 65-66 (1981).[10] There is no conflict in the decided cases on this point, and no reason for this Court to grant further review.

[10] Similar principles have been applied consistently in the federal courts of appeals in cases involving works of fiction. See, *e.g., Geisler* v. *Petrocelli,* 616 F.2d 636, 639 (2nd Cir. 1980) (The fact that similarities between the plaintiff and a character in a fictional work present an "amusing coincidence or even conscious parallelism on a superficial plane" is insufficient to establish liability); *Middlebrooks* v. *Curtis Publishing Co.,* 413 F.2d 141, 143 (4th Cir. 1969) (The law

(Footnote continued on next page)

2. In *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970), relied on by the court of appeals here (Pet. App. 3, 5-8), the plaintiff and the city of Greenbelt, Maryland had engaged in contractual negotiations. The defendant newspaper published a charge made during a negotiating session that the plaintiff's bargaining position amounted to "blackmail," which the publisher knew was not literally true. This Court nonetheless held that, "as a matter of constitutional law, the word 'blackmail,' in these circumstances was not slander when spoken, and not libel when reported . . ." 398 U.S. at 13. Emphasizing that the subject was one of legitimate public "concern" (*ibid.*), the Court reasoned:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime." 398 U.S. at 14.

(Footnote continued from previous page)

recognizes that "obvious works of fiction are normally understood by all reasonable men as not intended to depict or refer to any actual person . . . Authors of necessity must rely on their own background and experiences in writing fiction"); *Wheeler* v. *Dell Publishing Co.*, 300 F.2d 372, 375-376 (7th Cir. 1962) (Holding that, even when a fictional work is overtly based upon actual events and a character is identifiable as a real person, the work nonetheless is not actionable if the manner in which the character acts is clearly fictional); accord, *Smith* v. *Huntington Publishing Co.*, 535 F.2d 1255 (6th Cir. 1975), *aff'g*, 410 F.Supp. 1270, 1272-1274 (S.D. Ohio 1975).

The same principle was applied in *Old Dominion Branch No. 496, National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974). In that case, a union published in its monthly newsletter, under the heading "List of Scabs," the names of workers who had not joined the union. It thereafter defined a "Scab" as a:

> "two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles . . . The Scab sells his birthright, country, his wife, his children and his fellow men for an unfulfilled promise from his employer . . . [A] SCAB is a traitor to his God, his country, his family and his class." 418 U.S. at 268.

This Court noted that such comments, while extremely offensive, could not reasonably be understood literally or as factual representations:

> "Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who opposed unionization." 418 U.S. at 284.

Relying on its earlier decision in *Greenbelt*, this Court held that such a statement — which it was "impossible to believe that any reader" understood literally — was not actionable in the context of a labor dispute. 418 U.S. at 285-286.

The foregoing principles were applied to a satirical writing in *Myers* v. *Boston Magazine Co., Inc.*, 403 N.E.2d 376 (Mass. 1980), also relied on by the court of appeals here. That case involved a magazine article entitled "Best and Worst: Sports." Under the heading "Sports Announcer," the article stated the following concerning the plaintiff:

> "Worst: Jimmy Myers, Channel 4. The only newscaster in town who is enrolled in a course for remedial speaking." 403 N.E.2d at 377.

Relying on *Greenbelt* and *Letter Carriers*, the court held that such statements could not be understood literally, but at most suggested the opinion that the plaintiff "should" have been

enrolled in a remedial speaking course. As in *Greenbelt* and *Letter Carriers*, the court emphasized the *context* of the statements, in which "rough humor" and propositions which "are generally preposterous" were pervasive features. 403 N.E.2d at 377, 379-381. The plaintiff argued, as petitioner argues here, that unlike the cliches and figurative speech at issue in *Greenbelt* and *Letter Carriers*, the magazine article asserted factual propositions in declarative form. But the *Myers* court, like the court of appeals in this case, correctly applied the pragmatic approach mandated by *Greenbelt* and *Letter Carriers:*

> "Removed from context, the statement passes for a factual proposition whose sense is clear. Only in context does it assume ironic proportion, with an 'is' substituted for an 'ought.' But the mere presence of a different kind of figurative language from that found in other cases does not free this case from the claims of the distinction between fact and opinion. If the device here is lacking in art, it is no less figurative than a vague epithet or a soaring metaphor. And it deserves the same protection under the First Amendment.
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> The magazine's statement does not arise from 'conventional give-and-take in our economic and political controversies,' but it does partake of an ancient, lively tradition of criticizing, even lampooning, performers. To sharpen the bite of his rapier, a critic may resort to caricature or rhetorical license. So long as he excludes false statements of fact from his arsenal, the Constitution will shield him." 403 N.E.2d at 380-381.

The court of appeals in this case simply applied these sound and well established principles to the limited factual issue before it. Using the analysis of *Greenbelt, Letter Carriers* and *Myers*, the court of appeals examined the context of the portions of the story at issue here and found that "[i]t is simply impossible to believe that a reader . . . would not have understood that the charged portions were pure fantasy and nothing else" (Pet. App. 8). That careful scrutiny is essential in

free press cases, in which this Court has required an independent examination of " 'the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " *New York Times* v. *Sullivan*, 376 U.S. 254, 285 (1964). It also is consistent with the traditional function of a reviewing court in libel cases under the common law. *Restatement (Second) of Torts* §566, comment c at p. 173; *id.* at §614; *Myers* v. *Boston Magazine Co., Inc.*, 403 N.E.2d at 378-379.

3. Petitioner nonetheless contends (Pet. 3-4, 11-12, 19, 21) that the opinion below creates immunity for such works whenever an author injects any element of fantasy. To the contrary, the conclusion of the court of appeals did not turn upon the author's injection of a single element of fantasy. Rather, it was based upon the contextual approach approved by this Court and universally employed by other courts. *In context*, the element of levitation is just one element, among many others, which unequivocally tells the reader that all of the depictions in this story are pure fantasy.[11] The court of appeals left no doubt that its decision was based upon the entire context of the story in question, and not just the presence of a single element of fantasy (Pet. App. 5-6):

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[11] Other factors include: The story's fantastic title ("Miss Wyoming Saves the World . . ."); the description of the story as "humor" and the general disclaimer of any relation of characters in the story to real persons ("Any similarity between persons or places mentioned in the fiction or semifiction and real places or persons living or dead is coincidental" R. Vol. XXX. Ex. 351); the surrealistic character of accompanying artwork; the stream of consciousness narrative; the lack of even a minimal identification of the central character, Charlene, through use of any surname, photograph, drawing, or the like; the literary style and use of fanciful and alliterative names, e.g., "Monty Applewhite," "Corky Corcoran," "Laramie Lizards;" the use of stereotypes and the lack of concrete detail in the descriptions of places, characters, and the interactions among them; the lack of any mention of date or time; and the absurdity of the plot as a whole and the details depicted.

> "Here, the underlying event described was the Miss America Pageant, but it was readily apparent, with the extended description of thoughts of Charlene and other indications, that it was all fanciful and did not purport to be a factual account. In this context there are the particular three incidents which are in themselves fantasy and present levitation as the central theme and as a device to 'save the world.' We have impossibility and fantasy within a fanciful story. Also of significance is the fact that some of the incidents were described as being on national television and apparently before the audience at the pageant or part of the audience. This in itself would seem to provide a sufficient signal that the story could not be taken literally, and the portions charged as defamatory could not reasonably be understood as a statement of fact. Again, as the Court said in *Greenbelt:* ' It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant.'"

In fact, it is petitioner who would have this Court segment isolated statements in the story, wrench them from the context of the story as a whole, and find them actionable because, taken out of context, they are not inherently fantastical.[12] The law of libel always has required that an alleged defamatory statement be examined in the context of the publication as a whole. *Restatement (Second) of Torts* §563, comments d and e. And the need to examine statements in context was given constitutional status by this Court in *Greenbelt.*

Petitioner's effort to argue that her privacy was invaded as a result of being portrayed in a "false light" must fail for the same reasons. The "false light" claim, just like the libel claim, was predicated upon the Third Amended Complaint, which limited all claims to false literal meaning stemming from three specific incidents — each of which involved levitation through

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[12] Petitioner has not even furnished the Court with a copy of the satire at issue in this case. She prefers to quote from it selectively and out of context.

fellatio. Those fantastic events conveyed no literal meaning at all. Moreover, the gist of a false light privacy claim is a publication which contains a false factual representation, by which the plaintiff is "made to appear . . . otherwise than as he is." *Restatement (Second) of Torts* §652E, comment b. This Court has noted the similarity between "false light" and libel cases, in that both involve "public exposure by false matter . . ." *Time, Inc.* v. *Hill*, 385 U.S. 374, 384-385 n. 9 (1967). In *Hill*, the Court recognized the actionability of a "fictionalized" account, but only in "what purported to be a biography" — *i.e.*, fiction masquerading as the truth. *Id.* at 377-378, 393-396. Thus, the "false light" branch of the law of privacy also recognizes the distinction between works which present false statements about a real person as the truth — "falsifications which the reader might accept as true" and therefore "capable of presenting plaintiff in a false light" — and works which contain imagined events about a real person that the defendant has not "represented . . . to be true" and which make it "evident to the public that the events so depicted are fictitious." *Hicks* v. *Casablanca Records*, 464 F. Supp. 426, 432-433 (S.D.N.Y. 1978).

4. The unusual procedural posture of this case makes it an especially inappropriate vehicle for review of the broad constitutional issues that petitioner asks this Court to adjudicate. For tactical reasons, petitioner limited her complaint at trial to the sole claim that the article created a false impression that she committed three specific acts. At trial, this claim proved to be (and was conceded to be) unsupportable. See page 7, *supra*. Thus, at issue here is a narrow question of failure of proof, which turns upon the facts of record of this particular case.

The *Letter Carriers*, *Greenbelt* and *Myers* decisions prescribe a three-step inquiry. First, is the publication reasonably understood as intended to convey literal or factual information? Second, would a reasonable reader understand the author to be implying something on a nonliteral or figurative level? Third, is

the proposition which could be found to have been expressed or implied by the author actionable?

Because petitioner's pleadings drastically limited the scope of her case, the court of appeals did not need to go beyond the first step of the analysis. The opinion of the court of appeals correctly described the narrow scope of the issue before it as follows (Pet. App. 5):

> "The complaint, as amended, refers to these incidents and limits the consequences to:
>
> > 'The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest.'
>
> Plaintiff by her amendment of her complaint to avoid answering interrogatories, as mentioned above, *narrowed her cause to the three incidents and limited them to the descriptions with no general implications.* This had three consequences: the trial court limited defendants as to what they could question plaintiff about — no sex history; *prevented plaintiff from any use of general imputations of immorality; and caused a reliance on the particular descriptions"* (emphasis supplied).

At trial, no witness testified that he or she received any impression of fact from reading the story here at issue — or, in particular, that petitioner ever engaged in "fellatio" as described in the Third Amended Complaint. To the contrary, all witnesses testified that they understood that the story was a fantasy, and did not purport to relate any actual events. R. Vol. IX, pp. 208, 239, 251; R. Vol XI, p. 796; R. Vol. XIII, pp. 84, 265-266; R. Vol XIV., pp. 33, 35, 76. As the court of appeals explained, there was simply no evidence that would support a judgment on petitioner's theory of the case. "The witnesses from the community who appeared for the plaintiff *all* testified

that the story could not possibly be about her" (Pet. App. 6). "All the testimony from plaintiff's lay witnesses was that it could not be about the plaintiff" (*id.* at 8). The same factor was emphasized in *Greenbelt*, 398 U.S. at 14:

> "Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime."

Thus, because of the highly limited issue before it, the court of appeals' opinion has no bearing upon cases in which it may be claimed that plainly fantastic depictions have a figurative or allegorical meaning that expresses or implies facts about an individual. Nor does it immunize writings as to which reasonable persons could conclude that an author, even though writing a work of fiction, has made factual assertions about the persons who were models for the work.[13]

The narrow issue decided by the court of appeals is whether the record supported the only substantive allegation

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[13] This is what was alleged in *Bindrim* v. *Mitchell*, 92 Cal. App.3d 61, 78, 155 Cal. Rptr. 29, 39 (Cal. App. 1979), *cert. denied*, 444 U.S. 984, *reh. denied*, 444 U.S. 1040, the case principally relied upon by petitioner here and in the courts below. However, even the *Bindrim* court recognized the principle which governs this case:

> "The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described . . . In some cases, such as *Greenbelt Pub. Ass'n* v. *Bresler*, *supra*, 398 U.S. 6, 90 S. Ct. 1537, 26 L.Ed.2d 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks* v. *Casablanca Records*, (D.C.S.D.N.Y. 1978) 464 F. Supp. 426, a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author's imaginative explanation of an episode in that person's life about which no actual facts were known."

presented by petitioner's complaint. The court of appeals correctly concluded that the record is devoid of any such evidence and that petitioner's allegations concerning the meaning of the story were unsupported as a matter of law. Accordingly, petitioner's allegations did not warrant submission to the jury in the first place, even if the jury had been properly instructed.

Thus, even if this Court were disposed to fashion broad new rules of liability that would expose authors and publishers to multi-million dollar judgments for disseminating satirical works on subjects of general public interest, it should not attempt to do so on the record presented by this case.

5. Petitioner nonetheless argues (Pet. 14) that *Greenbelt* and *Letter Carriers* are inapplicable here because they involve publications affected with a "public interest," which purportedly is not present in the case of a "false and defamatory article about a private person in a 'girlie magazine.'"[14] If such an assertion is relevant at all, it ignores the larger significance of the "Miss Wyoming" story as a satire of the Miss America Pageant, which commands significant public attention throughout the nation. Any purported similarities between petitioner and the "Charlene" in the story which form the basis for

[14] The petition also suggests (Pet. 22-23) that the purported adverse effect of the story was enhanced because it was interspersed with other material in the magazine. This suggestion is without merit. The story in question was printed separately from and uninterrupted by other materials in the magazine. (For the convenience of the Court, we have lodged copies of the story as originally printed).

The petition also attempts to create the impression (Pet. 10, 13, 22-23) that *Penthouse* magazine is an obscene publication. This also is a false imputation. The very publication in question contained political discussion, articles about consumer products, and travel information, in addition to adult entertainment. The magazine is a lawful publication circulated in all 50 states, and the trial court specifically prohibited (in an order which was repeatedly violated by petitioner's counsel) any reference to the subject of "obscenity" (R. Vol. IV, p. 1390).

petitioner's claims all relate to matters which petitioner placed in public view as a public performer.

In a decision announced earlier this Term, this Court unanimously reaffirmed that public interest in a subject immunizes publicity which does not convey a false factual impression. *Connick* v. *Myers*, ____ U.S. ____, 51 U.S.L.W. 4436 (1983). All members of the Court concurred in the following point stated in the majority opinion:

> "The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See *Restatement (Second) of Torts*, §652D. See also *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975) (action for invasion of privacy cannot be maintained when the subject-matter of the publicity is matter of public record); *Time* v. *Hill*, 385 U.S. 374, 387-388 (1967)."

51 U.S.L.W. at 4437 n. 5. This is a question of law for the Court to resolve (*id.* at 4439 n. 10), based upon the "content, form and context of a given statement . . ." *Id.* at 4438.

The dissenting opinion in *Connick*, although disagreeing with the majority's application of this concept, adhered to the same view of the legal standard. The dissenting Justices emphasized that "the broad conception of 'matters of public interest' . . . defines the scope of constitutional privilege in invasion of privacy cases." And they quoted with approval the *Restatement (Second) of Torts* §652D, comment j (1977):

> "The scope of a matter of legitimate concern to the public is not limited to 'news' . . . It extends also to the use of names, likenesses or facts in giving information to the public for purposes of . . . amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."

51 U.S.L.W. 4443 n. 5. The same principle is used to define the scope of the common law fair comment privilege. See R. Sack,

Libel, Slander and Related Problems, Sec. IV.3.4, at pp. 169-172 (PLI 1980) (collecting cases).

The inquiry which is constitutionally permissible in evaluating a complaint against a work of fiction or humor is not whether the general reader would appreciate its purpose or message, but whether any reasonable reader would be left with the impression that the author is asserting false facts about the plaintiff. Whether a reader might or might not find the author's attempt at satirical commentary to be "funny," "tasteless" or "repugnant" depends upon his or her own sensibilities and is irrelevant to the constitutional inquiry. See Pet. App. 9; *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); *Winters* v. *New York*, 333 U.S. 507, 510 (1948) ("The line between . . . informing and . . . entertaining is too elusive for the protection of that basic right [of free speech] . . . Though we can see nothing of value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature").[15]

Petitioner nonetheless urges review (Pet. 23) because "[i]t is time for common sense to prevail." We also think it is time for common sense to prevail. If petitioner's unprecedented theory of liability were sustained in the present case, it would bring to a virtual halt the publication of satirical writing that is inspired even indirectly by real events and real people participating therein. If it were possible to sustain a multi-

[15] See also *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 444-445 (1963) (expression is protected regardless of "the truth, popularity, or social utility of the ideas and beliefs which are offered"); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 157-158 (1946) ("Under our system of government there is an accommodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values").

million dollar judgment without proof that a satire conveyed false factual information — that is, if such a judgment could rest on the mere allegation that the satire contains "outrageous ridicule" or "clearly demeaning fantasy" (Pet. 21) — no publisher would dare to publish the kind of satirical commentary on social events that from time immemorial has been a central component of free expression.

One striking measure of the fundamental error in the argument advanced by petitioner is its applicability to classical satires which could not seriously be considered to be unprotected by the First Amendment if published today. If the First Amendment permitted damage awards to be rendered against "clearly demeaning fantasy" or "outrageous ridicule" (Pet. 21) — even though no reader understood the satire to be a representation of fact — then the most famous satires in Western literature would be subject to condemnation. There would be no principled basis for punishing the publication here in question, while sheltering those writings.[16]

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[16] The heroine in the *Penthouse* satire is not the first character in a lampoon to "levitate" above the masses. In Aristophanes' comedy *The Clouds*, the philosopher Socrates is made to soar above the earth while engaged in ridiculous speculations. No one could conceive this to be a representation of fact; nonetheless, it exposed Socrates to ridicule. Dante went further than Aristophanes, placing Boniface in the *Inferno* many years before his death and exposing him to imaginary torments. This was an outrageous form of ridicule, but no reader failed to comprehend that it was wholly fictitious. In more recent times, Alexander Pope satirized Colley Cibber in the *Dunciad* and exposed him to rude and scatological abuse. Yet no reader conceived that those descriptions were other than sheer fantasy. Charles Dickens, in *Hard Times*, painted a portrait of professor Gradgrind that was modeled on Thomas Mill and his famous son, John Stuart Mill. The barbs were embarrassing, but the story was wholly fictive. Marcel Proust, in *Rememberance of Things Past*, based his degenerate nobleman, Charlus, on Montesquieu. Although Proust's character derived from real life, the preposterous events in the story were obviously works of imagination. Still more recently, the cartoonist Gary Trudeau has created characters in comic strips

(Footnote continued on next page)

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based on real life persons. For example, Professor Green, an absent-minded "flower child" of the 1960s, is inspired by Professor Charles Reich (the author of *The Greening of America*). The source of the joke is well known, but it is patently obvious that the cartoonist intended a comic lampoon and not a representation of fact. These examples could be multiplied endlessly. At the time these works were written, none of the subjects of the satires were political figures. As inspiraton for satire, their activities were comparable in all respects to those of persons participating in an event of general public interest such as the Miss America Pageant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

MISS WYOMING SAVES THE WORLD ... BUT SHE BLEW THE CONTEST WITH HER TALENT.*

[Illustration omitted]

Fuming inside her baby-blue warm-up suit, Miss Wyoming rushed into the cocktail lounge of the Beach Queen Motel, holding her baton at port arms. She saw in a flash that Corky wasn't there, and she stopped short midway between the lounge and the bar in order to catch her breath. Laughter drifted her way from the corner where Miss Alaska sat, at the head of the banquet table, sipping a frozen daiquiri. All of the women at the table wore evening gowns, and they were smiling at Miss Wyoming's warm-up suit in a way that made her fling her head back and move toward the bar at a pace somewhere between a strut and a sling, dangling the baton at her side like a parasol.

"What'll it be, Miss Wy?"

"Have you seen Cork---?" She caught herself and started over, slower this time, almost in a drawl. "Have you seen Mr. Corcoran, a member of my party?" Actually, there was no party, just Corky and she, which was only one of the things that made her feel so deprived. It was bad enough that they had to stay at a second-rate motel like the Beach Queen while the other girls, except for Miss Alaska, were all in penthouse suites in the posh hotels on the boardwalk; bad enough that all the others, *even* Miss Alaska, had come with large groups — men who looked like senators, women who belonged in mansions. But on top of that Corky had gone off two hours ago without telling her where to, and she had gotten so upset that she couldn't do even the simplest routines with the baton. Now, less than forty-five minutes before the preliminary talent contest, he still wasn't here, and she wanted to cry.

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* [Photocopies of this story, as originally printed in *Penthouse* magazine, have been lodged with the Court.]

"Haven't seen him all day," the bar man said, wiping a space on the bar in front of her.

She lay her baton flat where he had wiped and slumped onto a bar stool, leaning forward with her face propped on her hands. For a moment she longed for the musty security of the Laramie High School gym, where she had trained all summer under Corky's protective eyes. Thinking of those long, hot afternoons made her nostalgic, even though most of the time she had been exasperated with him, balking at the rigors he put her through, complaining that he never left her alone.

Just then she saw him poke his head inside the door of the lounge, and she felt a moment's rush of joy and relief before she reminded herself how upset she'd been. She pretended not to see him.

"How's my winner?" He called out in a voice geared to project across a gym, and then his fleshy hand was patting her back. She stiffened against it.

"A lot *you* care. I couldn't even practice."

"Aw, baby, I'm real sorry. I got tied up. Takin' care of politics, you know. Got to charm them on all fronts."

She knew that he wanted the title as much as she did, and she even felt a little silly now for not realizing that wherever he'd gone it was for her own good. But she said, "I need a drink," because she knew that would infuriate him. To the barman, she said: "Bourbon and ginger."

"Just make that a ginger ale," Corky cut in, barking it over the bar in his training voice. "*Diet* ginger."

Backstage she burped and tasted the sour residue of soda as she listened to Miss Wisconsin's piano rendition of "Moonlight Sonata." She was up next, and she felt as jumpy as a grasshopper and as small, imagining how she was going to look out on the runway with just her baton. She had no voice or musical talent to fill the dark acres of space in the audito-

rium, no dance routine with movements large and elaborate enough to create the illusion of stature, of dimensions beyond the actuality of her physical self. Just a stick of polished chrome to flip and curl about her fingers, some simple legwork executed with a high-stepping prance that had made her a halftime attraction at all the Laramie Lizards' home games.

As she slipped out of her warm-up jacket and pants, she had to think about her secret talent, her *real* talent, to make herself stop trembling. She recalled that Friday afternoon in late summer when she first discovered it, the events of that day unfolding like a stairway to a dream she still could hardly believe was true: unexpectedly running into Monty Applewhite, the Lizards' left end, in the gym; literally running into him, *colliding* with him as she pushed through the double doors to get a drink at the precise moment he came jogging up from the locker room; realizing in that moment when pressed against him not only how horny she was, sex playing no part in Corky's training strategy, but also how depressed, too, over her three hours' workout with the baton.

Then driving with him to Colter's Bay, signing in at one of the log cabins on the lake, hitting the bed as soon as they got inside the door, Monty lifting her first and then carrying her to the mattress like a deep pass he'd snagged, bringing her downfield, his body running hard with her, driving straight on, the end zone so close that they crossed into it too soon to enjoy the touchdown; and the disappointment afterward, the letdown, feeling herself rolling end over end back into her own isolation, Monty, too, quiet and joyless beside her in the moody silence of the cabin.

She was still brooding over it later, at dusk, as they walked along the shore of the lake, wondering how she even could have entertained the hope of becoming Miss America.

They had reached a deserted section of the shore, and Monty stripped off his clothes to go swimming. Feeling gloomier than she had all summer, she stared off across the lake to the blue gray rock of the Tetons that rose in sharp, chiseled ridges directly out of the water. The mountains were so magnificent, towering as they did so far above earth, so full of grandeur and majesty, that she began to weep.

At that moment Monty came dripping up out of the lake. He stood in profile on the shore, framed by the mountains. The twilight shaded the entire landscape blue: mountains and clouds, mist seeping like night's breath across the center of the lake, the air itself, soft and depthless as the space between stars. Monty's body, too, had been tinted, so that as he stood in silhouette, posed, he appeared more like a work of art than a Lizard, his private part extended without being rigid and arched in a downward curve like a spigot. She felt herself being drawn to it, and she did something she had never done to anyone.

She drew his flesh into her, not with her mouth alone but with her entire body, the deepest, most remote parts of her uniting in common effort, calling to him, worshipping side by side with her lips and tongue and the warm tube of her throat, all of her, body and soul, crying in harmony for nourishment. Beyond the borders of his hips, her glazed eyes scaled the Tetons, pleading with the snow-tipped summit of the highest peak for she knew not what — strength, endurance, love? — that she might lift his soul (and her own) from despair. He began to pour into her, and she thought she could feel his soul rising within him, his fountain rising at the same time so that she had to strain up on her knees to keep it in place. When she opened her eyes, she saw that it was not only his soul that had risen but his body, too. A good inch or inch and a half off the ground, he hung suspended from her mouth. In the blue light his face was transfigured by a rapture unparalleled by anything

else she had ever seen, his body floating as light and free as the lake mist, and she knew then that she would never have to feel worthless again.

If only, she thought while listening to the final falling notes of the Sonata, if only she could make them see her real talent, if only she could force them to look beyond the baton.

Baton in hand, she stood in the wings while Emory Dukes, the pageant emcee, introduced her.

"Now!" the stage manager said, shoving her forward.

She gripped the baton and strutted out onto the stage. When the spotlight struck her, she felt herself shrivel inside. *They'll laugh,* she told herself. *They're gonna laugh at this stupid baton.* But in her mind she saw Monty floating upward from her mouth, and she began to smile. She was the sister of the Grand Tetons, which meant *big tits* in French, and she shoved hers forward into the spotlight and highstepped her way to center stage, stopping at the tip of the runway long enough to make sure that the judges had their eyes on her. She flashed them a *watch-me* smile at the same time she spotted Corky at the edge of the runway, his face filled with longing and appreciation. With her head tossed back, she took a prancing step forward onto the runway, flashing her thighs, and swung her baton high in the air.

Closer than ever to his dream, Corky watched the baton flicker through the long, high beam of the spotlight and glitter as bright as a mirror held to the sun. The dream had first made itself known to him the year he turned forty while he was watching the pageant, drunker than usual and lonelier, in the same Laramie barroom where he had watched it for years. As each of the fifty contestants passed across the television screen, he realized with the sharpness of a pain even his night's drinking couldn't dull that this was as close to real beauty as he would ever get, that without his having noticed, his life had

crept up behind him and slipped a noose around his neck. As each of the contestants smiled and turned away, lost to him forever, he saw that his life was no more than a circle, that the lives of all men could be charted by one of two circles: an ordinary circle, which went round and round in the same orbit forever, or an extraordinary one, which was larger and touched the edges of many other circles, allowing a man to move from one extraordinary circle to another without limitation. He had been kicking around long enough to know that his future promised nothing more extraordinary than an undefeated season for the Lizards. Unless, he mused, watching that year's Miss Wyoming curtsy on the screen as he took a long draft of his beer, unless he picked himself one, got her into shape, turned her into a winner. Why not? he asked himself. Who knows more about building bodies than I do?

And that Monday he began his search, looking with new eyes at each of the Laramie High coeds that passed through his gym classes, until Charlene appeared in her orange jersey and black shorts one September morning, standing with her hands on her hips at the end of a lineup of freshman coeds, and he knew right away that he had all the raw material he needed.

Under the basketball hoop, he said: "I'm keeping my eye on you!"

"What for?"

"Miss America."

Charlene's eyes widened; she swallowed hard. "Me?"

They sure had come through a lot together, he was thinking, as Charlene turned at the tip of the runway and moved from drill step to strut, knees kicking and her head high as she approached the judges once again; and they would go through a lot more together, he hoped, tomorrow night when the pageant was over. When she reached the judges' booth, she

turned, marking time, so that they would have a full view of her — smile, bust, delicious thighs, all that raw flesh that he had shaped, larger than life on the runway above them.

"It'll be like the grand finale at the end of a fireworks display," he had advised her when they were plotting strategy. "The icing on the cake. Show 'em everything you've got." Everything being her face, bod, and a reprise of all her baton tricks. But what she was doing now was not part of the repertoire they had rehearsed.

She had gone from the two-hand twirl to a movement he didn't recognize. She held the baton out in front of her, one end inches from her smiling mouth, the other aimed directly down at the upturned heads of the judges. For a moment it looked as if she were playing a trumpet, but he saw that the gesture was more suggestive than that. While her right hand held the baton up to her mouth, her left stroked outward along the polished chrome in the direction of the judges. She had abandoned all semblance of a marching step. Instead her body swayed in a kind of interpretive dance, her shoulders rolling forward and back, her hips swiveling with slow determination as she continued the stroking motion.

What the hell? Corky fumed. *What in hell is she doing?*

She moistened the rubber tip with her tongue, trying at the same time to keep her mouth wide in a smile so that the effect was to give her lips a crazed, hideous imbalance. "Jesus Christ'" he mumbled out loud in spite of himself as she drew the tip inside her mouth. With her head and shoulders back, she inhaled deeply. She let her hands — first one, then the other — drop away from the baton. For a moment it hung limp, downcast. Then it began to rise slowly. Ignoring gravity, it lifted above the astonished faces of the judges, the audience, pointing in its arc higher than the upper tiers of the balcony, until it came to rest, its silver skin glistening, focused on the deep shadows of the ceiling.

The Miss America Orchestra quit midbeat, the musicians stalled in tableau, their instruments poised, mute. In the dark sky of the auditorium a silence, thick and sinister as a storm cloud, had settled. The crowd seemed not to be breathing, life manifest only in the eyes that, gaping awestruck, had witnessed the incomprehensible — miracle or obscene hoax? — and had been devastatingly humbled by it. Then the cloud broke. A low hiss of applause began in the recesses of the balcony, gusted up out of the lower tiers, came teeming down across the wide, flat spaces of the orchestra until at least half the audience was on its feet and the band jumped into something loud and brassy.

Corky glanced anxiously at the judges. They were fluttering in the booth like startled birds. Three of them looked downright horrified. One was writing furiously on his clipboard. Another swayed back against the rear wall, hand roofed above his eyes to ward off the dazzling shimmer of the baton, and one, at the far end of the booth, turning with a bewildered look from Miss Wyoming to the crowd behind him, put his hands together hesitantly and began to clap.

"What kind of crazy stunt was that?" Corky demanded the first minute he got her alone that night. They were heading back to the Beach Queen on a dark, windy street that led away from the boardwalk.

"You said to show them *everything*."

"It looked like you were giving the damn thing a blowjob."

"That's just . . ." But she stopped. He wouldn't understand. Only Monty understood.

"If I told you once, I told you a hundred times. You've got to keep the sex subtle. Like a candy bar," he explained. "You've got to put on a bright, clean wrapper. Keep the dark, chewy, good stuff inside."

"That's bullshit."

"That's America," he said. "They don't even call it a beauty contest anymore. It's a scholarship pageant now you know that."

"But didn't you like it *at all?*" she purred in her cutest kitteny voice.

Corky wasn't listening. "Maybe they didn't see it like that. Maybe it just looked like a fancy circus trick. Maybe," he pondered aloud, his voice barely concealing a whimper of sadness, "I've just got blowjobs on the brain . . ."

In baby-blue chiffon, Miss Wyoming waited onstage with the forty-nine other state representatives for Emory Dukes to read the names of the ten finalists. She trembled as the television cameras were being rolled down the runway because she was sure that, of all of them, it was her face that was now growing larger on 60 million television sets from coast to coast, as if the cameramen had already divined her destiny and were giving the viewers at home a peek at things to come.

"Miss Virginia," Emory Dukes called out. "Miss Montana, Miss Iowa, Miss Wisconsin, Miss Arkansas, Miss New Hampshire, Miss Oklahoma, Miss Alaska . . ."

Miss Wyoming was still waiting for her name to be called when the curtain began to close. In the dressing room she sat on a bench, numbed, ignoring the other girls while out on the stage the finalists displayed their talents. She closed her ears against each high-pitched burst of song that drifted back, each fragment of vibrato, each note of piano and violin. Right before they were all to assemble on stage for the grand finale, Miss Alaska swept past her bench, her head and shoulders tossed back. "Tough luck, sweetie," she said.

It was one injustice too many, and Miss Wyoming's foot shot out. "You're not even from a real state," she said, toppling Miss Alaska. "You're not even from a real goddamn state."

"I am so!" Miss Alaska protested on the way down. Her hands clawed wildly for support, found the hem of Miss Montana's gown and tore it loose from the bodice.

"Bitch!" Miss Montana shrieked, yanking her gown free and stepping back, in the process knocking against Miss Idaho, who was at the next table and was spraying her hair with an aerosol can. Miss Idaho turned the can around and sprayed directly into Miss Montana's face. Miss Montana choked; her eyes teared. She reached for a tube of lipstick and streaked down the middle of Miss Idaho's gown. Miss New Jersey punched Miss Montana. Miss New York threw a powder puff at Miss New Jersey. Miss Florida shoved Miss New York, who shoved Miss Tennessee. Miss Tennessee spit at Miss Florida.

Miss Alaska was still shouting, "I am *so* from a real state; I am *so!*" when the stage manager rushed in. "Girls! Girls!" he pleaded to the mass of tangled bodies in the middle of the room. "What is the meaning of this?"

Five minutes later, when he was marching them out single file and still bitching, he noticed Miss Wyoming on the bench. "And what do you think *you're* doing?"

"Nothing," Miss Wyoming said, leaning back against the wall with her arms folded. "I'm not doing *anything.*"

"You'll regret this. Mark my words!" And then he whirled around and trailed after the ragged line.

A moment later Corky popped his head inside the door. "What's the matter, darlin'?" he slurred, the anticipation of the big night having driven him to drink beyond his capacity. He wavered into the room, looking sheepish, his arms extended.

Miss Wyoming thought that she was going to cry. She leaned all the way forward and pressed her face into her hands.

"Try not to take it so hard, darlin'."

"Why the hell not?" She was pissed that he could adjust so quickly, that his getting ripped had dulled his disappointment. But when she lowered her hands and looked at him there in front of her, weaving in place, his eyes lovesick and weary, she couldn't be angry with him.

Corky hiccuped and sat down on the bench, as he did so pulling his pants up at the knees. He leaned over and put his hand on her knee. She might have been a Lizard he was consoling for having fumbled at a critical moment. And then she did cry. In loud, breathless sobs, leaning against him.

Holding her tight, he closed his eyes and patted her. All summer he had dreamed of holding her, but his gesture now was without lust. In some way he felt responsible for her tears, for having brought her this far, to this disappointment, and he wanted only to comfort her as best he could. His head was spinning wildly, and he had to open his eyes. "I think it was the talent business . . ."

"I have talent," she sobbed. "I have *real* talent."

"I know, darlin'," thinking she meant the baton, "but . . ." He knew he had no power to change what had happened, but he wanted, at least, to try to explain it for her. "I think what it was, honey, is that you're just too damn sexy. I mean, you don't even have to *do* anything; it just oozes out of you as natural as . . ." One hand clamping her shoulder, the other waving helplessly in the air, he floundered for a comparison. "As natural as . . . sweat." It was not the word he wanted — he had wanted something else, something prettier — but his head was fuzzy, and the thought he was trying to shape was growing, moment by moment, dimmer. He hurried to finish before it went dark altogether. "And anything too real scares the shit out of people, I guess."

It was the most profound insight he'd ever had, and he felt pleased with himself. Miss Wyoming was pleased, too, overjoyed, in fact, and she stopped crying immediately because now

she understood why she had not made the finals. She was so happy that she leaned up and kissed him warmly on the neck. "Thanks," she said. "For that. For everything."

And then she was on her feet, wiping the tears from her face. "Help me, Corky. Help me show them."

Show who? he wondered, upset by her sudden movement, the walls spinning one way, Charlene the other.

She hurried him down the corridor toward the stage. For a moment she fumbled with the curtain and then found the opening and pulled him out onto the stage.

"What are you *doing?*" he wanted to know, feeling the stage careening around him and trying to regain his balance.

"Shhhh!" She knelt down and unzipped his fly. She wanted to show them that her talent was nothing to be feared, not dangerous, but beautiful and necessary.

"Not here," he pleaded, dreaming of a long night's privacy at the Beach Queen as she dipped inside his pants with one hand and steadied him with the other.

"Trust me," she whispered, and she slipped him into her mouth just as Emory Dukes announces the fourth runner-up.

They were shielded from the audience by a wall of evening gowns and Miss Wyoming struggled not to be distracted by the goings-on downstage. She thought of the Tetons, her sisters, and blue lake mist. As Emory Dukes called out the third and second runners-up, she imagined the questions that the judges would ask *her* when they realized their mistake, when they saw to what uses her talent could be put.

Why do you want to be Miss America? *Because I want to help the people of the world; I want to be the special ambassador of love and peace.*

Would you blow the entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro? *I*

would, I would. And in her mind she saw rising above the towering Tetons, like movie credits, the words: MISS WYOMING SAVES THE WORLD!

For a moment Corky had the awful feeling that he was no longer standing on solid ground, and he thought, *O God, I must be really lit.* He wanted to chastise himself for getting so drunk, but never before in his entire life had he felt anything so wonderful. His head began to roll out of his control in a crude, uneven circle, and his eyes closed. All he could think of was that maybe he had made a mistake; maybe they really *were* back at the Beach Queen, and he was at long last being saved once and for all from his ordinary life, coached by the one he had coached toward a victory neither of them could have anticipated. From far away, part of a world Corky was fast leaving, Emory Dukes announced the first runner-up.

The audience was whistling and clapping for the New Miss America as Miss Wyoming took another deep breath and drew on Corky with all the energy she had left. An inch off the ground now and rising. Corky forgot himself completely and began to make low, gurgling noises. Several girls in the row in front of them turned around. As his noises grew louder, becoming unearthly in the chaos of his euphoria, more of the girls turned, until in their amazement they unwittingly opened an alley that led all the way downstage to where Miss America was being crowned.

Emory Dukes launched into "There She Goes" as Miss Alaska, flowers in hand, innocent smile flashed to the world, started down the runway. But the television cameras did not follow her. They remained stationary, trained down the alley where they had a head-on view of Miss Wyoming. Dreaming not of USO shows and appearances at 4H clubs but of what a Miss America *should* be, she knelt in service to her country with her eyes raised to Corky, his head and arms flung back in unimaginable delight, having just passed the three-inch mark and still ascending.

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
Civil No. C79-351

KIMERLI JAYNE PRING,
Plaintiff,
vs.
PENTHOUSE INTERNATIONAL, LTD., A New York Corporation, INLAND EMPIRE PERIODICALS, INC., an Oregon Corporation, and PHILIP CIOFFARI,
Defendants.

THIRD AMENDED COMPLAINT

Facts Common To All Causes of Action

The following facts are common to all causes of action hereinafter plead and the said facts are incorporated by this reference into all subsequent causes of action set forth herein.

1. The Plaintiff is a resident and citizen of Wyoming and as a citizen and has enjoyed all of the privileges of such during all the years past.

2. The Defendant, Penthouse International, Ltd., is a New York corporation with its principal place of business located in the City of New York and State of New York and such Defendant owns and publishes *Penthouse*, a monthly magazine of general circulation in the United States and various other parts of the world, including the State of Wyoming.

3. Inland Empire Periodicals, Inc., is an Oregon corporation qualified to do business in the State of Wyoming and is the local distributor in Wyoming of *Penthouse*.

4. The Defendant, Philip Cioffari (Cioffari) is a resident and citizen of the State of New Jersey.

5. This Court has jurisdiction by reason of the diversity of citizenship of the Plaintiff and Defendants and by reason of the fact that the amount in controversy is a sum in excess of $10,000.00, exclusive of interest and costs.

6. The acts of the Defendants complained of herein were jointly done and concurrent in nature so as to make all the Defendants joint tortfeasors and individually and jointly liable to the Plaintiff for the damages hereinafter alleged.

7. Without inquiry or notice to the Plaintiff, the Defendant Penthouse International, Ltd., and the Defendant Cioffari developed and created and authored an article concerning the Plaintiff, utilizing her title and likeness without her consent, in the August 1979 issue of *Penthouse*, a copy of said article is attached as Exhibit "A" to Plaintiff's Second Amended Complaint and by this reference made a part hereof. Said article is entitled "Miss Wyoming Saves The World. . . . ., But She Blew The Contest With Her Talent."

The article referred to was distributed throughout Wyoming and elsewhere in *Penthouse* magazine by Defendants.

8. In September of 1978, the Plaintiff was chosen Miss Wyoming to represent the State of Wyoming in the Miss America Pageant held in Atlantic City, New Jersey. The Miss America Pageant is an annual event which receives national publicity and television coverage. The purpose of such Miss America Pageant being to choose "Miss America" from the most outstanding representatives of each of the States.

9. Although the actual name of the Plaintiff was not used in the above referred to magazine article, her title and likeness were used so that it is clear, and the public and persons comprising the public would know and reasonably believe that the article was with reference to and described the Plaintiff. In this regard, Plaintiff states as follows:

(a) Plaintiff was the 1978 Wyoming entry to the Miss America Pageant in Atlantic City, New Jersey, as suggested in the article.

(b) The Plaintiff is an expert baton twirler who has been awarded many honors for her expertise including the 1978 United States Grand National Women's Sole Championship.

(c) The Plaintiff had previously attended the University of Wyoming in Laramie, Wyoming, and was the leading baton twirler for the University of Wyoming football team for three years.

(d) The Plaintiff did in fact wear a blue warm-up suit in her preparation for the Miss America Pageant.

(e) The Plaintiff also wore a blue chiffon gown in the Miss America Pageant as depicted in the article.

(f) The Plaintiff has been the only entry in the 1978 Miss America Pageant who did an act with a baton or exhibited baton twirling expertise.

(g) That the Plaintiff is not a public figure and even if construed to be one the article contains such a fictionalization and misrepresentation of the Miss America Pageant that the article is not newsworthy or of any public interest and no privileges apply.

10. The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest.

11. The aforesaid article was false and the Defendants knew that said article was false, and by the exercise of reasonable care and diligence, the Defendants could have determined the falsity of the article. Instead, the Defendants intentionally, willfully and maliciously published and distributed said article knowing the same to be untruthful, defamatory, libelous and that it would damage the Plaintiff. That the Defendants authored, published and distributed this filth with willful disregard of the rights of the Plaintiff for the purpose of making a profit. That the article was not newsworthy or of public interest; was lurid, indecent; was primarily designed to appeal to prurient interest and was such a fictionalization and misrepresentation of the Miss America Pageant that no immunity under the constitutional guarantees of free speech or free press are applicable to protect the Defendants or permit them to publish this article.

12. The article in question was defamatory upon its face, and libelous per se, but Plaintiff further alleges that said article was, in fact, recklessly published without regard to the existence or nonexistence of the truth, and that all of the Defendants are, therefore, guilty, not only of negligence, but of malice as well.

13. As a result of the libel above referred to, and hereinafter alleged, the Plaintiff has suffered greatly. Her reputation as an honorable, morally straight individual and first class representative of the State of Wyoming in the Miss America Pageant has been destroyed and she has suffered a loss of income in the past of $10,000.00, and will suffer a loss of income in the future of $100,000.00. Additionally, the aforesaid libelous matters have and will impair the Plaintiff's business and her business ventures to the loss in the sum of $500,000.00.

14. As a result of the libel made upon this Plaintiff and the destruction of her good name and reputation thereby, she has been required to endure in the past and will be required to

endure in the future, grave mental, emotional and physical pain and suffering, she has become ill and has suffered a personality change which will be permanent.

Further, the Plaintiff has suffered great embarrassment and humiliation and the Plaintiff will in the future endure constant embarrassment, humiliation, pain and suffering from the loss of her good name and reputation, and as a result of the aforesaid damage, and as a result of the damage caused to Plaintiff's good name and reputation, the Plaintiff has suffered general damages, in addition to the special damages above alleged, in the amount of $2,000,000.00 for which recovery is also sought herein.

15. That the actions of the Defendants in authoring, publishing and distributing libelous and defamatory material of the nature involved in this matter, are reckless and malicious acts in complete disregard of the rights of Plaintiff and as a result of the reckless, willful, wanton and malicious acts of each of the Defendants, the Plaintiff is entitled to exemplary and punitive damages in the amount of Five Million Dollars ($5,000,000.00).

I

Plaintiff's First Claim Against the Defendants

For Plaintiff's first claim against the Defendants, jointly and severally, Plaintiff alleges and states as follows:

16. Plaintiff refers to all allegations contained in the paragraphs set forth under the heading, "Facts Common To All Causes of Action", above, and makes said allegations therein contained a part hereof.

17. The picture, the headline and the other paragraphs in the article when given their clear and ordinary meaning, suggest, infer and imply as an illustration of said story, that Plaintiff:

(1) Did those things as alleged in paragraph 10 hereof.

(2) That Plaintiff's talent in baton twirling is an analogous talent and runs parallel to a sexually deviant talent as set out in said article which Plaintiff, as Miss Wyoming supposedly possessed and used to commit the acts stated in paragraph 10 hereof.

18. All of the foregoing statements and innuendos arising therefrom are false and defamatory.

19. Penthouse International, Ltd., had no information of the kind published in its abovementioned article which is claimed to be libelous and that instead, the matters therein contained, and each of them, were fully fabricated by Penthouse International, Ltd. and Philip Cioffari, maliciously published by each Defendant without just cause and with willful disregard of the truth, and were published to create a sensational story and in order to further the sales of *Penthouse* magazine.

II

Plaintiff's Second Claim Against the Defendants

For Plaintiff's second claim against the Defendants, the Plaintiff alleges and states as follows:

20. Plaintiff refers to all allegations contained in the paragraph set forth under the heading "Facts Common To All Causes of Action" above, and "Plaintiff's First Claim Against The Defendants", and makes said allegations therein contained a part hereof.

21. The above referred to actions of Defendants constituted an unwarranted and unreasonable invasion of Plaintiff's right to privacy as a direct result of which she has been held out to the public in a false light and has been damaged.

22. Plaintiff is a private person, an ordinary, reasonable woman and the several infringements upon her right of privacy, described above, were substantial and were the result of

conduct to which a reasonable and private person would strongly object and of such a nature to be highly offensive and destructive to Plaintiff as they would be to any reasonable person. Defendants invaded the Plaintiff's right of privacy without her permission and with knowledge that their actions would be offensive and destructive to the Plaintiff, a person of ordinary sensibility, and with the knowledge that their publication was not newsworthy or of public interest.

III

Plaintiff's Third Claim Against The Defendants

For Plaintiff's third claim against the Defendants, Plaintiff alleges and states as follows:

23. Plaintiff refers to all allegations contained in the paragraphs set forth under the headings "Facts Common To All Causes of Action", and to the allegations contained in "Plaintiff's First Claim Against The Defendants" and "Plaintiff's Second Claim Against The Defendants" and makes said allegations therein contained a part hereof.

24. That the intentional, willful, wanton and malicious acts of the Defendants are of a type which should not be permitted or tolerated when the foreseeable result thereof will be of harm to an innocent victim such as the Plaintiff in this case. Therefore, an example should be made of these Defendants to deter wrongful conduct of this nature in the future and exemplary and punitive damages should be assessed against these Defendants in the amount of Five Million Dollars ($5,000,000.00).

IV

Plaintiff's Fourth Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd.

For Plaintiff's fourth claim against the Defendants Philip Cioffari and Penthouse International, Ltd., the Plaintiff alleges and states as follows:

25. Plaintiff refers to all allegations contained in the paragraphs set forth under the headings "Facts Common To All Causes of Action", and to the allegations contained in "Plaintiff's First Claim Against The Defendants", "Plaintiff's Second Claim Against The Defendants" and "Plaintiff's Third Claim Against The Defendants" and makes said allegations therein contained a part hereof.

26. The placing of the article in the August 1979 issue of Penthouse magazine amounted to a willful, intentional and malicious infliction of mental suffering and severe emotional distress upon the Plaintiff. In particular and without limiting the generality of the foregoing, the references to Plaintiff in the article considered together with the other articles, photographs, cartoons, the title "Miss Wyoming's Unique Talent" being printed on the cover of the magazine, and other writings concerning and expressly describing or depicting various sexually perverted acts, exposing the genitals of the people whose pictures were exhibited as well as depicting explicit homosexual and heterosexual actions and scenes caused such intentional infliction of emotional distress.

27. The mere fact that the article appeared in the August 1979 issue of Penthouse without Plaintiff's consent constituted an intentional infliction of emotional distress upon Plaintiff or in the alternative, such caused an infliction of severe emotional distress upon Plaintiff and was done by these Defendants with reckless disregard for the consequences or the truth.

V

Plaintiff's Fifth Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd.

For Plaintiff's fifth claim against the Defendants Philip Cioffari and Penthouse International, Ltd., the Plaintiff alleges and states as follows:

28. Plaintiff refers to all allegations contained in the paragraphs set forth under the headings "Facts Common To All Causes of Action", and to the allegations contained in "Plaintiff's First Claim Against The Defendants", "Plaintiff's Second Claim Against The Defendants", "Plaintiff's Third Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd.", "Plaintiff's Fourth Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd." and makes said allegations therein contained a part hereof.

29. The above referred to article and the placement of the article and any and all references to Plaintiff within the August 1979 issue of Penthouse magazine constituted a negligent infliction of emotional distress upon Plaintiff which proximately resulted in damage and injury to Plaintiff as more particularly specified hereinabove.

WHEREFORE, Plaintiff respectfully prays that a judgment be rendered against the Defendants, jointly and severally, for the relief requested herein and for what other relief the Court deems equitable and just.

DATED this ____ day of _____, 1980.

KIMBERLI JAYNE PRING
Plaintiff

By _____
of Spence, Moriarity & Schuster
Attorneys for Plaintiff
P.O. Box 554
Jackson, WY 83001
(307) 733-7290

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 1980, a true and correct copy of the foregoing Third Amended Complaint was placed in the U.S. Mails, postage prepaid and addressed to all counsel of record as follows:

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New York, NY 10022

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of SPENCE, MORIARITY & SCHUSTER

No. 82-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIMERLI JAYNE PRING,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD., A NEW YORK CORPORATION, AND PHILIP CIOFARRI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF BY PETITIONER

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No. 82-1621

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Kimerli Jayne Pring,

Petitioner,

vs.

Penthouse International, Ltd., a New York Corporation, and Philip Cioffari,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Reply Brief by Petitioner

In their brief in opposition, Penthouse and Respondent Cioffari make first arguments which becloud and conceal the clear constitutional questions raised by this petition which concern the breadth

of license that publishers can constitutionally claim to defame and ridicule all citizens -- public and private figures, famous and obscure persons alike. Penthouse asserts that the simple expedient of some obvious fictional embellishment should serve as a complete defense to the vilest defamation and to any invasion of privacy, no matter how despicable.

Penthouse wields this argument against a young woman from Wyoming whom it chose to ridicule and degrade before its vast readership, transforming her from a decent, fine, private person into a brazen, strutting hussy who performs deviant public sexual acts. Penthouse then adds to this defamation an obvious fiction that Miss Pring's fellatio is of such quality that men are levitated, and seeks immunity for the entire article as a consequence of this gratuitous

addition. It hurts as much and the public shame and the humiliation are as great whether the article is or is not immunized.

1. Penthouse defines the test for its own liability as "...whether any reasonable reader would be left with the impression that the author is asserting false facts about the plaintiff," (Res., p. 23. See also Res., pp. 9, 12, 18, 23, 24.). Yet, it makes first arguments which ignore the fact that the trial judge instructed the jury that before it could find against Penthouse it must first find that the article "contained false statements of fact about the plaintiff." Penthouse also ignores the fact that the jury rendered a special verdict finding that Penthouse "had knowledge of or acted in reckless disregard of whether the published matter would be understood

by a reasonable person as conveying statements of fact about the plaintiff." Please see the discussion in our petition at pages 16 through 18.

2. Next, Penthouse by first arguments characterizes Miss Pring as a public figure which ignores the pretrial determination of Judge Brimmer that Miss Pring was a private figure, and the special finding of the jury that Miss Pring was a private figure.

Finally, in his denial of Penthouse's motion for a new trial, Judge Brimmer reaffirmed his earlier determination that Miss Pring was a private person, not a public figure. This ruling was made after the judge had the benefit of his entire involvement with the case.

3. In first arguments, Penthouse attempts to reargue the question of whether the article was of and concerning

Miss Pring, although the identity of Miss Pring is unmistakable (please see the discussion at page 8 through 10 of Petitioner's brief). More importantly, the issue was specifically determined by the jury by its special verdict finding that "a reasonable man (person) would understand that the plaintiff, Kimerli Jayne Pring, was the person referred to therein."

This ruling by a 5-4 divided court below is at odds with the entire body of general libel law in the country, and, unless this Petition is granted, a new First Amendment immunity against both libel and invasion of privacy will be created for any publisher who wishes to immunize an otherwise actionable publication by including a segment of obvious fantasy within the publication.

The constitutional issue was clearly

stated by Judge Breitenstein of the Tenth Circuit: "Penthouse cannot escape liability by relying on the fantasy used to embellish the fact...Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy." (Pet. App. p. 10 - emphasis added)

Respectfully submitted,

G. L. Spence
Robert P. Schuster
SPENCE, MORIARITY & SCHUSTER
Counsel for Petitioner